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Governing the politics of consent: Gender, expert knowledge, and Bill C-49.

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**Governing the Politics of Consent:
Gender, Expert Knowledge, and Bill C-49**

**by
Marcia Oliver**

**A Thesis
Submitted to the Faculty of Graduate Studies and Research
through the Department of Sociology
in Partial Fulfillment of the Requirements for
the Degree of Master of Arts at the
University of Windsor**

Windsor, Ontario, Canada

2002

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ABSTRACT

Bill C-49 was enacted in the Canadian Criminal Code in 1992. For the first time in Canadian legal history this new legislation provided a definition of consent as it applies to sexual assault offences. The enactment of Bill C-49 by Parliament was clearly aimed at resolving problems that emerged within legal proceedings dealing with sexual assault. Bill C-49 was therefore enacted to govern the legal proceedings of sexual assault cases and actors of the juridical field. The courts, in turn, have adopted complex heterogeneous ways of dealing with, and managing their relations in light of, the legislative amendments of Bill C-49.

Employing a feminist understanding of governance in the context of sexual assault, I argue that determinations of consent are governed by a complex assemblage of legal rationalities, expert knowledges and responsibilization strategies employed by judicial actors in sexual assault cases. The various ways that these governing mechanisms link up and contest with one another plays an essential role in determinations of consent. More specifically, the degree to which these governing mechanisms interconnect reflects elaborate power/knowledge relations within the juridical field that arise from, but also perpetuate, normative constructions of gender and heterosexuality. Determinations of consent therefore constitute a contested site where power is exercised through competing rationalities, knowledges and strategies of various actors within the juridical field.

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Introduction

Ideas of consent are pivotal within Canada's criminal justice system in understanding the current-day offence of sexual assault (Baker, 1999). Prior to the first set of legal reforms in 1975-1976¹, the early common law rules regarding rape viewed all evidence of a woman's sexual character relevant to her credibility. This character was relevant to her intent and therefore to her consent (Bowland, 1994: 243). Women were deprived of the right to refuse sexual access to some men if it could be established that they had freely engaged in sexual activities with others. Therefore, the complainant's past sexual history was considered crucial by the courts in determining whether she had in fact consented to the activity in question (Los, 1994: 25). Under the common law, however, some restrictions did apply to the accused's access to a woman's sexual history. The accused could not ask questions regarding the sexual activities and reputation of the complainant after the time of the offence and, despite the accused's right to ask questions regarding a woman's past sexual history, the accused did not have the right to expect answers (Bowland, 1994:245). The enactment of the 1976 legislative amendments reversed these common law restrictions, thereby expanding the rights of the accused (Bowland, 1994). At this time, the legal concept of consent underlined the law's understanding of rape, albeit very differently than today's legal understanding of consent. Intercourse was defined as rape by the law when the woman's consent was 'extorted by threats or fear of bodily harm' (section 143 as cited in Los, 1994: 25). Employing the

¹ The legislative amendments of 1975-1976 specify, in section 142 of the Criminal Code, that 'no questions shall be asked as to the sexual conduct of the complainant with a person other than the accused' unless reasonable notice in writing has been given to the prosecutor and a hearing in camera concluded that the exclusion would prevent a just

concept consent to describe a woman's non-consent implies that women were in a state of constant consent to men and therefore women could not be raped totally against her will (Los, 1994: 25). Although the 1983 legislative reforms sought to define consent in terms of the 'voluntariness' of the act, the legal reforms of 1992 expanded the legal understanding of consent by clearly defining situations and circumstances that negate consent specific to sexual assault offences. These circumstances were implemented to reflect a woman's non-consent to sexual conduct.

Drawing upon these socio-historical studies dealing with sexual assault reform it becomes evident that notions of consent are socially constructed and defined differently across time, space and various cultures (Roberts et al., 1994; Haag, 1999). This research study focuses on one specific initiative to codify and define consent within Canada's criminal law of sexual assault. Bill C-49, an act to amend the Criminal Code (sexual assault)², was enacted in the Canadian Criminal Code in 1992. For the first time in Canadian legal history this new legislation provided a definition of consent, reflecting both affirmative and negative elements of consent, as it applies to sexual assault offences (Roberts et al., 1994).

Feminists writing from a poststructuralist perspective have had very little to say about issues surrounding consent in sexual assault cases. This research study contributes to an understanding of the politics of consent from a perspective that challenges us to examine the knowledges, processes and methods employed by the judiciary in 'distinguishing [determinations of] Truth from Falsehood' (Smart, 1995:8). A

determinations of an issue of fact, including the credibility of the complainant' (cited in Los, 1994: 48).

² S.C. 1992, c. 38. The section numbers referred to in this thesis are from the amended Criminal Code, R.S.C. 1985, c. C-46.

poststructuralist perspective is not interested in making or determining an alternative Truth per say, but rather is committed to a specific analysis of connections and processes between determinations of consent and mechanisms of governance. Drawing on feminist understandings of governance, I argue that determinations of consent in sexual assault cases are governed by a complex assemblage of rationalities, knowledges and strategies employed by judicial actors that interconnect, and at times conflict, with one another. Determinations of consent therefore constitute a contested site where power is exercised, in both repressive and productive forms, through competing legal rationalities, knowledges, and strategies that arise from, but also perpetuate, normative constructions of gender and sexuality.

CHAPTER I

Conceptual Framework

Bourdieu (1987) conceptualizes the juridical field as a ‘social space’ wherein direct conflict between parties is converted into a ‘juridically regulated debate’ between legal actors. The juridical field therefore facilitates the law to define and resolve conflicts according to its own rules and principles (Smith, 2000). This is important within a governance perspective as it compels us to examine historically-specific knowledges that emerge in specific localities and practices that are underpinned by ‘coherent systems of thought’ (Rose, 1999) or ‘mentalities of government’ (Hunt et al., 1994). Adopting the perspective put forth by Alan Hunt and Gary Wickham (1994) urges us to examine the emergence of new and distinctive ‘mentalities of government’, under the neologism of ‘neoliberalism’³, that developed in the western world from the eighteenth century onwards. Neo-liberalism, in simple terms, refers to the re-organization of systems of thought or ways of thinking that are associated with specific key elements of an ‘alternative formula of rule’ (Rose, 1993:298; Stenson, 1999). The key elements of neo-liberalism⁴, for my purposes, include governing society through the regulated and

³ Neo-liberalism is referred to by some scholars as ‘advanced liberalism’ (for example see Rose, 1993; Isin, 2000). I am however, using Rose and Miller’s understanding of neo-liberalism to refer to a “re-organization of political rationalities that brings them into a kind of alignment with contemporary technologies of government” (1992: 199) or, in other words, a re-organization of political rationalities that are associated with certain key elements of an alternative formula of rule (Rose, 1993). In simple terms, neo-liberalism is a framework that views power as a matter of “networks and alliances through which “centres of calculation” exercise “government-at-a-distance” (Rose and Miller, 1992).

⁴ It is critical to point out here that although neo-liberalism is described as the dominant contemporary rationality of rule, Mitchell Dean cautions us that it is “found within a field

accountable choices of autonomous agents; the production of truth through assertions of objective, neutral, scientific discourses; and a new reconceptualization of experts as knowledge workers who provide information, not only to individual subjects for the purposes of self-government but also, to regulatory agencies for purposes of evaluation and consideration in rendering judgments (Rose, 1993; 1999). These new mentalities of governance entail a “calculating preoccupation with activities directed at shaping, channelling and guiding the conduct of others” (Hunt et al., 1994:26). Building on this, we therefore can conceptualize governance, at its most general level, as “any strategy, tactic, process, procedures, or programmes for controlling, regulating, shaping, mastering or exercising authority over others in a nation, organization, or locality” (Rose, 1999:15). It follows, then, that all operations of law are distinctive instances of governance (Hunt and Wickham, 1994) which involve the use of various forms of rationalities, knowledges and strategies in the production and dissemination of Truth. Moreover, because law and the operations of law cannot be understood as separate from governance it follows that they cannot be understood as separate from power (Hunt et al., 1994). A feminist understanding of governance alerts us to the many ways that power is deployed, especially in ways which are expressly gendered (Smart, 1995). It is important to clarify here that power, from this perspective, is conceived as having both productive and repressive effects; it both enables and constrains action (Lacombe, 1996:339).

The governance literature makes clear that government is a problem-solving activity (Garland, 1997). The enactment of Bill C-49 was implemented in 1992 as an ad hoc attempt to correct problems that emerged within legal proceedings dealing with

of contestation in which there are multiple rationalities of government and a plurality of varieties of neoliberalism (1999:150).

sexual assault⁵, such as the admissibility of women's past sexual history as evidence for the defense. Bill C-49 was therefore enacted to govern the legal proceedings of sexual assault cases and actors of the juridical field. The courts, in turn, have adopted complex heterogeneous ways of dealing with, and managing their relations in light of, the legislative amendments of Bill C-49. I am concerned with the various ways that the Supreme Court judiciary exercises power, in particular the various ways of thinking and styles of reasoning that are embodied in particular legal practices and actions, in determinations of consent in sexual assault trials. Adopting a feminist understanding of governance in the context of sexual assault reflects a commitment on my part to question the various ways that power is deployed in determinations of consent through normative constructions of gender and heterosexuality. Within legal proceedings dealing with sexual assault offences, the deployment of power is not random. Power is deployed in ways that construct femininity and masculinity in oppositional modes and constructs normal heterosexual encounters according to this dichotomy. It is therefore critical to unmask the gendered nature of power present within legal rationalities and proceedings that deal with determinations of consent in sexual assault offences.

Governance, Feminism and Determinations of Consent

Employing a feminist understanding of governance compliments this analysis of judicial determinations of consent as it alerts us to, and urges us to be critical of, the many power effects of laws' operations in sexual assault trials. A critical reading of Supreme Court judgments is essential to the task of grasping the various ways that legal

⁵ See section V. The Emergence of Bill C-49 for details regarding the problematizations of sexual assault.

proceedings maintain structural and systematic power inequalities between men and women. More specifically, employing feminist understandings of governance in the context of sexual assault compels us to question the construction of knowledge and its role in producing legal truth-claims. This involves employing a critical method that aims to grasp the conditions that give rise to regimes of truth and consequently to regimes of power. The various modes of governance that are involved in determinations of consent must be assessed in light of normative discourses of gender and heterosexuality. These normative discourses both rely on and perpetuate constructions of femininity and masculinity in oppositional modes and construct heterosexuality in terms of “natural” male sexual aggression and “passive” female sexualized bodies (Smart, 1995). This assessment will contribute to broader understandings of the governance of sexual assault offences, specifically the various ways that power is deployed by the juridical field at the expense of women’s diversity, sexual autonomy, and equality. A feminist understanding of governance illustrates that multiple ideological convictions work together, build from one another, and offer new directions of inquiry.

It is critical to clarify here that there is no one feminist understanding of governance. Therefore, there exists diverse ways of employing the intellectual tools produced by scholars in these areas (Dean, 1999; McLaren, 1997). From reading various researchers who employ these perspectives it becomes evident that referring to ‘law’ and ‘the law’ in the singular is problematic (Rose and Valverde, 1998). I agree with Hunt and Wickham that referring to law in the singular, with a unitary appearance, is misleading despite its prevalence in many legal discourses and theories of law (1994:39). Carol Smart (1995) suggests that the depiction of law as a unitary phenomenon is achieved through a linguistic device that further empowers legal discourse. In effect, law is

positioned on a “hierarchy of knowledges which allows for the “disqualification of ‘subjugated knowledges’ and hence gives rise to the power of law” (Smart, 1995:72). Law, therefore, is understood as a “complex of practices, discourses and institutions” (Hunt and Wickham, 1994:39) that deploys power through making claims of truth (Rose et al., 1998; Smart, 1995; Hunt et al., 1994). Judicial claims to truth are rooted in both legal and non-legal discourses, which entail taken-for-granted assumptions of both femininity and masculinity and normative heterosexuality.

Recognizing the role played by law in constructing, as well as perpetuating, normative constructions of gender and sexuality raises questions concerning the processes and strategies employed by judicial actors in determinations of consent. The work of various scholars, specifically Nikolas Rose, Alan Hunt, Carol Smart, and other critical feminist scholars dealing with sexual assault, such as Lise Gotell, Margaret Denike and Christine Boyle, informs this research study as their work provides a critical perspective that challenges me to study the various ways that sexual assault cases are governed. This involves an investigation into the legal processes, methods, strategies, knowledges and rationalities used by judicial actors in determinations of consent in cases of sexual assault. More specifically, these scholars alert me to the interconnections among knowledge, power and truth, which is described as always resulting in the exclusion, marginalization and subjugation of other knowledges (Bunting, 1998; Smart, 1995; Hunt et al., 1994). The production and dissemination of truth claims, specifically in this case judicial determinations of consent, always involves the consideration of “the power dimensions within which the knowledge [or truth claims] are produced” (Hunt et al., 1994:13). Building on these perspectives, the focus of this research study is on judicial determinations of consent, understood as a highly contested site within the juridical field,

in sexual assault cases. It is through judicial determinations of consent that power and knowledge (in both legal and non-legal forms) comes together in a highly dynamic and intricate, and arguably gendered, relationship in the governance of sexual assault cases. Attention is paid to various interconnecting governing strategies, such as legal rationalities, responsabilization strategies, and expert knowledges, employed by judicial actors in determinations of consent.

Conceptualizing Key Concepts

In drawing upon Rose's (1999) understanding of political rationalities and Smart's (1995) discussion of law as a technology of gender, legal rationalities refers to the shared vocabularies, legal principles and explanatory logics that organize judicial disputes regarding key political problems in sexual assault. These key problems include the gendered nature of sexual assault, the impact of fear of sexual assault on women, and balancing Charter rights of both women and men. I have chosen to modify Rose's (1999) understanding of political rationalities in light of various socio-legal feminist discussions on law's role in constructing and disseminating discourses of normative heterosexuality and gendered identities (for examples see Smart, 1995; Denike, 2000; Gotell, 2001). This understanding of legal rationalities is primarily used to illustrate and expose the defining characteristics of legal thought that are central to sexual assault offences within the juridical field. However, this does not imply that legal rationalities are somewhat less political than what Rose is referring to. The concept legal rationalities is used in this analysis as simply an epitomizing tactic that refers to common ways of thinking and organizing logic, and therefore constructing knowledge, regarding key political problems in sexual assault within the juridical field.

Responsibilization strategies aim to subjectify individuals as rational citizens actively involved in governing their own conduct. In other words, responsibilization strategies rely on the individual 'self' to govern and control their own behaviour and conduct according to normalized prescriptions or standards of appropriate conduct. The individual 'self' internalizes principles of responsibility, accountability, autonomy and rationality and then acts in ways that are aligned with socially appropriate behaviour simply because it is believed that it is in their best interest to do so (Rose, 1999).

Responsibilizing individuals is part of a neoliberal governing strategy that governs society "through the regulated and accountable choices of autonomous agents" (Rose, 1993:298). The legislative amendments of Bill C-49 intended to place greater responsibility on men to take reasonable steps to secure consent from women in sexual encounters. Implicit within these amendments are the following presumptions. It is presumed that all individuals are autonomous and capable of self-regulation, that 'reasonable steps' is equivalent to responsible conduct, and that judicial actors know, using specific forms of knowledges, what constitutes "good, virtuous, appropriate, responsible conduct of individuals" (Dean, 1999:12). There is not, however, one unanimous or uncontested understanding of appropriate conduct and behaviour of individuals.

Determinations of consent in cases of sexual assault entail multiple rationalities that responsibilize and de-responsibilize individuals in various, and often oppositional, ways. Central to these various responsibilization strategies are dominant understandings of gender and sexuality, which are constructed as natural, and hence normal. These normalizing constructions of gender and sexuality are used as common standards in which judicial actors and professional experts measure the 'appropriateness' of one's

conduct and behaviour. This process of measuring and evaluating ‘appropriate’ conduct informs diverse legal rationalities regarding a woman’s consent. It is critical to note, however, that there are multiple standards of ‘normal’ used by various actors of the judiciary, and hence these multiple understandings of normality give rise to competing and conflicting constructions of both femininity (and masculinity) and heterosexuality. These competing understandings of gender and sexuality are exemplified by different legal rationalities embedded within the majority judgment and the dissenting minority judgments.

Expert knowledge is one form of knowledge that plays a key role in interrogations of consent in sexual assault cases. The reliance upon expert testimonies and records within legal proceedings characterizes a strategy of governance within neoliberalism. The use of professional expert knowledge is one strategy deployed to govern individual conduct and characteristics of populations (Rose and Miller, 1992; Rose, 1993; 1999). Regimes of government are dependant upon professional and expert forms of knowledge to “monitor, enact, evaluate and reform both the subjects and objects of government” (Isin, 2000:149) and in “establishing the possibility and legitimacy of government” (Rose et al., 1992). Expert knowledge, therefore, is understood in this research study as the usage of, the reliance upon, and the complex assemblage of private documents, records, or testimonies that are deemed to constitute professional or specialized bodies of knowledge within legal proceedings of sexual assault.

The various ways that these governing strategies link up and contest with one another plays an essential role in determinations of consent. More specifically, the degree to which these governing strategies interconnect reflects elaborate power/knowledge

relations within the juridical field that maintain, and at times resist, dominant discourses of gender and heterosexuality in determinations of consent.

CHAPTER II

Problematizing Consent in Sexual Assault Cases: The Emergence of Bill C-49

The various ways that we understand notions of consent are situated within historically specific social and institutional arrangements of our society. Notions of consent, as they relate to sexual assault, are therefore conceptualized very differently in contemporary society than decades ago. The legal understanding of consent has, for example, shifted from women's consent as always being present, thereby perceiving women as active participants in coercive sexual intercourse [as in the pre-1983 section 143] (see Los, 1994:25), to situations or circumstances that negate a woman's consent, such as fear or the abuse of a position of trust, power, or authority [as in section 273.1(2)]. The multiple and at times contradictory rationalities within current Supreme Court judgments of sexual assault suggests that notions of consent are contingent upon various fields of knowledge and power relations. It is critical then to investigate the processes involved in the production of knowledge as this results in the subordination, and possibly silencing or marginalization, of other knowledges (Hunt et al., 1994). Therefore, following Hunt and Wickham (1994), the truth of law is not to be taken for granted but rather it is to be seen as a problem to be investigated. Take for example the processes followed by the Supreme Court in determining ruling judgments in cases of sexual assault. Rulings or judgments are made when the majority of Supreme Court judges are in concurrence. This in turn excludes other judgments and rationales, and possibly other forms of knowledge that are in dissent to that of the majority ruling. This process is problematic when we consider the large amounts of research that report women's negative experiences of legal proceedings dealing with determinations of

consent in sexual assault offences. This research alerts us to the routine presence of rape myths and stereotypes of women in legal judgments regarding consent, the blindness of law to larger social and political factors that maintain sexual inequalities between men and women, the silencing of women's experiences and knowledges in legal proceedings of sexual assault, the frequent admittance of evidence regarding women's sexual character as relevant in establishing consent, and the prioritizing of men's rights to a fair trial over the equality rights of women (See Bowland, 1994; Smart, 1998; Baker, 1999; Denike, 2000; Gotell, 2001). Broadly speaking, many of these concerns were at issue in the consultation processes leading up to the enactment of Bill C-49.

A decade has passed since the enactment of Bill C-49 and hence it is important to critically examine and evaluate the various ways that this Bill has been interpreted and put into practice by the courts. Existing research that addresses various dimensions of Bill C-49 includes analyses of the practices and processes involved in constructing and enacting the legislative amendments of Bill C-49⁶, the impact of this legislative reform initiative in terms of its application to women's constitutional rights as guaranteed by the Canadian Charter of Rights and Freedoms⁷, the constitutional challenges that have been

⁶ For example see Sheila McIntyre's (1994) perspective on the consultation process leading up to the enactment of Bill C-49. She emphasizes the fundamental basis of the coalition's approach was rooted in and justified by Charter equality guarantees.

⁷ See Catherine Dauvergne's (1994) analysis on the effects of a constitutional charter of rights on the discourse of sexual violence. At this time she was optimistic of Bill C-49 and its interpretation by the courts; Christine Boyle and Marilyn MacCrimmon (1998) analyze sexual assault in terms of all constitutional rights including equality; Margaret Denike's (2000) examination of sexual assault proceedings and jurisprudence focuses on the "principles of fundamental justice".

raised in response to the enactment of Bill C-49⁸ and the limitations to legislative reforms in the context of sexual assault⁹. What is interesting, however, is the extent to which sexual assault offences, specifically legal proceedings dealing with determinations of consent, have been largely overlooked from feminist understandings of governance. Broadly speaking, this research study contributes to feminist understandings of governance as it begins to unpack the interrelations and contestations of various neo-liberal governing strategies that are employed by Supreme Court judges in determinations of consent in sexual assault offences. More specifically, this research study describes the processes and modes of deploying power that are expressly gendered in determinations of consent. The various ways that power is deployed through the judiciary's determinations of consent not only relies on normative constructions of gender and heterosexuality, but also plays a critical role in transmitting these normative constructions to the population (Smart, 1995).

The following questions guided my research study as they highlight key processes, namely those related to legal rationalities, responsabilization strategies, and expert knowledge, employed to govern sexual assault offences. How are sexual assault cases governed by determinations of consent? What various forms of rationalities, knowledges

⁸ See Christine Boyle and Marilyn MacCrimmon's (1998) discussion on the constitutionality of Bill C-49 by exploring various constitutional challenges to parts of the Bill.

⁹ See Kwong-leung Tang's (1998) analysis of rape law reform in Canada. She highlights the success and limits of reform legislation. Overall, despite the shortcomings of rape law reform, she is an advocate for social and collective actions to strengthen sexual assault legislation; and Margaret Denike's (2000) findings address the failure of equality reforms to sexual assault proceedings. Focusing on the "principles of fundamental justice", she notes that Canadian sexual assault jurisprudence has failed in terms of a "practical functioning of a system of 'justice' that has failed to embrace [the] accomplishments or their transformative potential in social policy" (pg. 157).

and strategies are employed by the Supreme Court judiciary in negotiating and informing provincial court appeals regarding sexual assault offences? To what extent have legal rationalities and legal strategies shifted in response to the enactment of Bill C-49? Has the enactment of Bill C-49 made persons more accountable? Has it responsabilized some persons more than others? What role does expert knowledge play in court proceedings and legal rationalities dealing with determinations of consent in sexual assault cases? I hope to demonstrate that these questions can be answered by thinking about the interconnections between various operations of law and strategies of governance within sexual assault cases. I will first describe the processes that I employed to select the Supreme Court cases that are included in this research study.

Supreme Court Judgments of Sexual Assault Cases

The inclusion of specific Supreme Court cases in this research study was based on two important criteria. The first was that each case had to explicitly deal with sexual assault offences. The second criterion involved the cited regulations and statutes in each case. Each case had to address at least one of the legislative amendments outlined by Bill C-49. Therefore, each case had to address one of the following provisions: 1) section 273.1 (the consent provisions); 2) section 273.2 (provisions that restrict the defendant from using the mistaken belief in consent defence); and/or 3) section 276 (provisions that restrict the admissibility of evidence and define the parameters that judges will use to determine admissibility of evidence). These provisions are outlined in Appendix B: Legislative Amendments of Bill C-49: An Act to Amend the Criminal Code (sexual assault).

Exploring Supreme Court decisions that deal with provincial court appeals of sexual assault offences offer a rich opportunity to investigate the various, and often contradictory, forms of legal rationalities and strategies employed by various judiciaries. The advantage of carefully documenting and critically analyzing Supreme Court decisions of sexual assault cases is twofold. Firstly, I am able to examine the various rationalities embedded within lower court judgments of sexual assault cases. This will highlight the contested issues, for example the use of a woman's past sexual history or counselling records as evidence for the defence, that are of central concern in the appeal process brought before the Supreme Court of Canada. Secondly, I am able to explore the various forms of legal rationalities and strategies employed by both the majority court (refers to the majority of judges that are concurrence) and the dissenting minority court (refers to those judges who disagree with the decision of the majority court) of the Supreme Court judiciary in negotiating and informing these appeals regarding the contested issues of specific sexual assault cases.

The main objective of this research study is to gain some insight into how the Supreme Court is currently situated by exploring a number of taken-for-granted assumptions embedded within normative constructions of gender and sexuality that underlie a number of Supreme Court decisions dealing with determinations of consent. Broadly speaking, I demonstrate the various ways that sexual assault cases are governed by a diverse range of rationalities, strategies and knowledges, employed by various judicial actors in determinations of consent in sexual assault cases. Specifically, I address the many ways that judicial determinations of consent reinforce and reproduce networks and relations of power. This research study explores the extent to which, and the ways in which, Bill C-49 has had an effect on shifting and reshaping the judiciary's

understandings of, and sensibilities to, the diverse perspectives and experiences of women who have been sexually assaulted.

The Emergence of Bill C-49

Bill C-49, or what is commonly referred to as the 'No means No Law', emerged in a specific social historical context reflecting a complex assemblage of political aims, social perspectives, and legal rationalities. More specifically, the legislative amendments were enacted into the Canadian Criminal Code as an ad hoc attempt to resolve this Supreme Court of Canada decision in *R. v. Seaboyer*¹⁰ and to ensure that this decision would not become common practice in cases of sexual assault. The majority of Supreme Court judges (seven of the nine) ruled in *R. v. Seaboyer* that restricting the use of evidence regarding a woman's prior sexual history with individuals other than the accused man was an unconstitutional violation of the man's right to a fair trial (McIntyre, 1994). Determinations of the admissibility of such evidence would be left to individual judges. The majority of the Supreme Court was therefore confident that judges could be trusted and were able to function free of rape myths and gender biases¹¹ (McIntyre, 1994:294-295). This decision instigated public concerns regarding the criminal justice system as it deals with sexual assault. Many women's groups, such as the National Action Committee (NAC), the Women's Legal Education and Action Fund (LEAF), and

¹⁰ *R. v. Seaboyer* [1991], 2 S.C.R. 577.

¹¹ The Supreme Court decision in *R. v. Seaboyer* (1991) removed the limitations on sexual character evidence that the old common law rules provided and broadened the scope of judicial discretion in admitting such evidence. This provided judges with the discretion to admit evidence of a woman's past sexual history to support a man's defense that he believed the woman consented (Bowland, 1994:252). Implicit within this judgment is the idea that judges are able to act as neutral and objective observers capable of making value-free judgments.

the National Association of Women and the Law (NAWL), believed that it represented a devastating setback to women's rights in Canada (Roberts et al., 1994) to the extent that some argued that the position of complainants in sexual assault cases was worse than ever before (Bowland, 1994). Bill C-49 was therefore enacted to increase the degree of protections for victims of sexual assault and "to meaningfully advance women's safety, liberty, and equal benefit and protection of criminal and constitutional law" (McIntyre, 1994:296).

The enactment of Bill C-49 was largely in response to public, largely feminist, concerns regarding this Supreme Court decision. The various approaches taken to enact the criminal law reforms of Bill C-49 are particularly interesting in that they were developed outside the legal arena, utilizing a wide range of resources from feminist organizations (Dauvergne, 1994; Tang, 1998). These included frontline rape and transition-house workers, national women's organizations, and other people with experience in the social realities of sexual assault (Tang, 1998). Rose and Miller (1992) describe how professional groups and reform campaigns define aspects of economic or social life in terms of a problem requiring attention, then seek to align their specific aims with the political objectives of the state and the subjective choices of individuals. This is illustrated by the feminist coalitions involved in drafting Bill C-49 as they sought and achieved consensus on the specific provisions they wanted to see in the new legislation, and then used the language of rights discourse as a tool to promote that consensus to government (McIntyre, 1994). More specifically, the feminist coalitions pursued substantive, rather than simply evidentiary, amendments to sexual assault law (Roberts et al., 1994). These amendments, for example those that redefined the mens rea of sexual assault and codified circumstances that negate consent, were aligned with Parliament's

commitment to equality jurisprudence as outlined by Canada's Charter of Rights and Freedoms.

The context of the new legislation, although only partially included in the Criminal Code, consists of and was shaped by a preamble that problematized sexual assault by outlining key political problems in sexual assault offences (See Appendix A). The preamble situates sexual assault in its gendered context, notes the unique character of the offence and the impact of fear of sexual assault on women, and states Parliament's intention to encourage reportings of sexual assault and to ensure protection of Charter rights for both complainants and accuseds (McIntyre, 1994:310). It is suggested that the enactment of this legislation marks a new era in the evolution of sexual assault law, as it was drafted with all relevant co-existing constitutional rights in mind (Boyle et al., 1998: 203). What is critical to note here is the distinction between Parliament's intentions of enacting Bill C-49 and the various ways that the Bill is interpreted and practiced, to different degrees and in varying forms, by judicial actors. As we will see in some cases, and as Supreme Court Justice L'Heureux-Dube points out, "the tenacity of discriminatory beliefs and their acceptance at all levels of society clearly demonstrates that discretion in judges is antithetical to the goals of Parliament" (cited in Ewanchuk, 1999)¹².

The consultations involved in crafting Bill C-49 focused on three main issues: 1) It defined the legal parameters that judges will use to determine whether a woman's sexual history may be admitted at trial thereby giving judges clear guidance as to the limited circumstances in which a woman's sexual history may be admitted; 2) It provided a definition of consent for the purposes of sexual assault offences thereby narrowing the availability of the mistaken belief of consent defense by ensuring that an accused person

will not gain an acquittal unless the woman has given a genuine consent to sexual activity; and 3) It restricted the mistaken belief of consent defense as it concerns sexual offences by placing a duty and responsibility on an accused person to take reasonable steps to ascertain whether consent has been given to the sexual activity in question (Roberts et al., 1994:11-14). As we would expect, and as Christine Boyle and Marilyn MacCrimmon (1998) note, these three issues are interrelated and at times dependent upon one another within sexual assault law. The legal meaning of consent will “inevitably affect what it is an accused can be mistaken about, and the substantive issues in a trial will inevitably determine the scope of material and relevant evidence” (Boyle et al., 1998:198).

It is only by looking at legal rationalities and operations of law, in a specific historical context, that enables us to see the diverse and conflicting modes of legal governance surrounding issues of consent today. The various ways that judicial actors interpret and apply the legislative amendments of Bill C-49 to cases of sexual assault are dependant on a diverse range of governing strategies that reinforce and reproduce networks and relations of power. The judiciary’s understandings of consent and the various modes of governance employed in establishing a woman’s consent or non-consent are central to understanding the power dimensions within which determinations of consent are produced. The production of legal truth-claims, in particular judicial determinations of consent, entail a complex assemblages of legal rationalities, expert knowledges and responsibilization strategies. These modes of governance are assessed in the following sections in light of normative constructions of gender and heterosexuality.

¹² R. v. Ewanchuk [1999], 1 S.C.R. 330

CHAPTER III

Law, Consent and the Sexually-Autonomous Subject

The law is premised upon the liberal-humanist subject- autonomous, responsible, and rational individuals who are deemed equal to one another and therefore capable of being governed by universal laws (Smith, 2000:287). Legal rationalities are premised upon the idea that each individual possesses the requisite autonomy to reject the terms of contracts that are not in one's best interests (Gauthier, 1999:73). These rationalities presume the existence of 'free will' and 'choice'. However, these presumptions are not without critique. Carole Pateman claims that the starting point of early social contract and consent theory was a specific conception of individuals as 'naturally free and equal', or as 'born free and equal to each other', however, "neither the classic contract theorists nor their successors incorporated women into their arguments on the same footing as men" (1988:72-73). Winnie Tamm further exemplifies this point by stating, "[w]omen were intentionally excluded from those accounts of the nature and function of autonomous individuals who could freely enter into social contracts that would protect rational self-interest to the greatest degree" (1992:214).

Prior to the 1900's, and in some cases until the mid-1900's, women were not considered to have the same legal capacity as men and therefore were not entitled to the same legal rights, such as excluding women from the federal legal definition of 'person', prohibiting women from retaining property after marriage, and segregating women from the rights to equal pay and fair employment. In Canada, women's legal right to vote was obtained at both the provincial and federal level between 1916-1925 (with the exception

of the Province of Quebec where the right to vote in provincial elections was not obtained until 1940) (Cleverdon, 1978). Women's exclusion from these fundamental rights has resulted in the commitment and dedication of many feminist organizations and women's groups to promote and demand social and legal reform that reflects gender equality and the full inclusion and recognition of women's fundamental rights. The legislative amendments of Bill C-49, specifically the provisions defining consent in sexual assault offences, reflect Charter principles that proclaim women's rights to autonomy, security of person, choice, and privacy of personal information.

In contemporary understandings of sexual assault, interrogations of consent within the juridical field rely on notions of the "liberal autonomous subject entering freely into contracts of consent to sexual encounters in a moment of choice" (Carrington et al., 1996: 266). A contract solution, based on the assumption that each individual possesses freedom and autonomy, ignores the social and political realities of many women who experience instances, or live under conditions, of sexual exploitation and abuse. Under conditions of sexual exploitation, "women's sexual autonomy, though it is assumed to exist in the abstract, fails to find recognition in the actual practices of an exploitive society" (Gauthier, 1999:73). By assuming that all individuals possess freedom and autonomy, consent theory neglects to acknowledge that it is critical, not only for individuals to act responsibly and in one's best interest, but also for the institutions and practices of society to respect such capacities (Gauthier, 1999:73).

Sexual autonomy, understood here as a matter of choice (the capacity to exercise self-agency to reflect one's best interest) and as a matter of politics (societal recognition of and respect for difference and diversity) is a very important marker of equal status in

society. The legislative amendments of Bill C-49 arguably reflect this. For the first time in Canadian legal history Bill C-49 provided a definition of 'consent' as it applies to sexual assault offences (Roberts et al., 1994). Defining consent, including circumstances that negate consent, as it applies to sexual offences is one of the Bill's most significant features "as it has been one of the most troublesome concepts for women in the courts" (Dauvergne, 1994:298). The enacted consent provisions of Bill C-49 made consent to sexual activity an "explicit requirement rather than an implied default based on some circumstances" (Alksnis, 2001:78). Section 273.1(1) defines consent as the 'voluntary agreement of the complainant to engage in the sexual activity in question.' This provision ideally enhances respect for the sexual autonomy of women in that it requires attention to be paid to the different factors that may affect voluntariness (Boyle et al., 1998), such as fear, abusing a position of power, trust or authority, or passivity.

Furthermore, section 273.1(2) states that no consent is obtained where:

- a) the agreement is expressed by the words or conduct of a person other than the complainant;
- b) the complainant is incapable of consenting to the activity;
- c) the accused induces the complainant to engage in the activity by abusing a position of trust, power, or authority;
- d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity;
- or
- e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity

Section 273.1 clearly leaves open the possibility that other conditions than those listed in Subsection (2) may establish no consent, by adding section 273.1(3), which states that "nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained." These consent provisions, as written in the Bill's text, reflect the egalitarian assumption that only an individual herself can properly consent. However, the

enactment of these consent provisions in the Criminal Code raises two concerns regarding the production and dissemination of legal 'Truth'. Firstly, underlying the written legal text is the presumption that it is the 'written form of a rational will' (Smart, 1995:74). In other words, the written text/law is implicitly embedded within rationality and objectivity (Smart, 1995). Secondly, the enactment of the consent provisions implies that there is a common or essential experience of sexual assault, meaning that any experience of sexual assault (refers here to a True 'legal' experience of sexual assault) will fall within the parameters outlined by these provisions set out in the Canadian Criminal Code.

In *R. v. Ewanchuk* (1999), L'Heureux-Dube (writing for the majority court) expressed that the application of s. 273.1(2)(d) acknowledges that when a woman says 'no' she is communicating her non-consent and that this expression has an enforceable effect, regardless of what the accused thought it meant. Similarly in *R. v Esau* (1997)¹³, Justice L'Heureux-Dube, this time writing for the dissenting minority court, recognized that society's mores and attitudes with regards to gender roles and relations have changed thereby transforming the criminal offence of sexual assault. She further clarifies this by referencing a comment that she made in *R. v. Park* (1995, para. 42), which states: "Today's offence of sexual assault is founded on respect for women's inherent right to exercise full control over their own bodies, and to engage in sexual activity that they wish to engage in." Justice Major (also writing for the majority court) in *R. v. Ewanchuk* (1999) reiterates this point by noting that the criminalization of sexual assault reflects society's commitment to protecting the personal integrity of each individual as this lies at the core of human dignity and autonomy. Applying the work of Carole Smart (1995) to

¹³ *R. v. Esau* [1997], 2 S.C.R. 777

the above-mentioned rationalities, it becomes apparent that normative discourses of heterosexuality align, and thereby construct, the personal integrity of women with retaining control over one's body, rather than in terms of responsible or ethical behaviour. Sexual assault, in turn, is constructed and defined in terms of a violation or an infringement of 'the body', in particular the woman's body. The 'bodies' of women are therefore central in constructing our understandings of normative heterosexuality and ideas of sexual assault. However, conceptualizing heterosexuality and sexual assault in terms of the body perpetuates common-sense perceptions of difference between masculinity and femininity or between maleness and femaleness (Smart, 1995:79). It appears natural, rather than socially constructed, in these arguments that men are the perpetrators of sexual assault and women are the victims. It therefore becomes essential for women to retain control over their sexuality through the giving or withholding of consent as this is a reflection of one's identity; one must have control over the body in order to gain the full capacities of autonomy and dignity.

The importance of recognizing the sexual autonomy of women, however, is undermined in a trial court judgment in *R. v. Ewanchuk* (1999), which acquitted the accused on the grounds of an 'implied consent' defense. The trial judge found the woman to be a credible witness and found that she had not consented to any of the sexual touching; he accepted her evidence that she said "no" on three different occasions. He also accepted her evidence about her level of fear and her reasons for acting confident to avoid a violent assault. The trial judge then characterized the defense as one of 'implied consent,' meaning that despite her believable reasons for behaving as she did, her

behaviour could have been interpreted as constituting consent to the sexual touching.

Although the Alberta Court of Appeal recognized that no such defense exists in Canadian law, the majority of judges upheld the acquittal and dismissed the appeal on the basis that the Crown had failed to prove beyond a reasonable doubt that the accused had intended to commit an assault upon the complainant.

Implicit within these judgments are legal rationalities that deploy specific kinds of calculation, methods and specialized languages to minimize the possibilities of an unjust, or wrong, conviction. Pat O'Malley suggests that uncertainty is a "characteristic modality of liberal governance that relies both on a creative constitution of the future with respect to positive and enterprising dispositions of risk taking and on a corresponding stance of reasonable foresight or everyday prudence ...with respect to potential harms" (2000:461). What is interesting about O'Malley's (2000) understanding of uncertainty when aligned with the legal rationalities of the trial judge is that they entail common-sense notions, or in O'Malley's words "reasonable foresight or everyday prudence", of both femininity and masculinity. By employing the language of 'implied consent', the trial judge is, arguably, actively participating in the construction of dominant gender differences that are held to be natural, as existing outside of culture (Smart, 1995). The woman's failure to continue explicitly stating 'no' was rationalized in terms of her body and behaviour that entailed a form of consent, described by the judge as implied consent. Although the trial judge recognized that implied consent was not equivalent to genuine or 'true' consent, her failure to continue stating 'no' could only be interpreted as 'yes' by the naturally aggressive and sexually active masculine man. The judgment given at this level of the judiciary demonstrates the various ways that women are constituted as sexualized bodies

in which it is understood that the body speaks louder than her reason (Smart, 1995). The trial judge based his uncertainty on “reasonable foreseeability” accessible through common sense and practical experience. We can see from the case above that legal rationalities employ the standard of ‘reasonableness,’ for example in terms of a reasonable doubt or a reasonable person, as a mode of calculation in determining the absence or presence of consent. These rationalities not only are premised on ideas of probability, possibilities and consequences, but are part of a process that contributes to the gendering of masculine/feminine identities and subjectivities (Smart, 1995).

The comments of Justice McClung, one of the judges writing for the majority position at the Court of Appeal level, exemplify the occurrence of legal rationalities that undermine the sexual autonomy of women. In his opening statements, he noted that “it must be pointed out that the complainant did not present herself to Ewanchuk or enter his trailer in a bonnet and crinolines ... she was the mother of a six-month-old baby and, along with her boyfriend, she shared an apartment with another couple.” When describing the motivation of the accused’s actions he concludes that “the sum of the evidence indicates that Ewanchuk’s advances to the complainant were far less criminal than hormonal.” McClung’s rationale, as illustrated here, exemplifies the recurrence of ‘heteronormativity’s key scripts’ (Gotell, 2001: 317). These assumptions include the “assertion and reassertion of an active, uncontrollable male sexuality and passive female sexuality; the incredibility of sexual coercion; and the construction of women as more emotional, less rational and less reliable than men” (Gotell, 2001:317). Furthermore, by reducing the accused’s actions to hormonal instincts, Justice McClung implies that the accused is less responsible and less accountable for violating the complainant’s sexual

autonomy because of his natural, masculine, aggressive sexual disposition. The legal rationalities embedded within McClung's judgment, as noted by Supreme Court Justice L'Heureux-Dube, "[do] not derive from the findings of fact but from mythical assumptions that when a woman says 'no' she is really saying 'yes,' 'try again,' or 'persuade me' it denies women sexual autonomy and implies that women are walking around this country in a state of constant consent to sexual activity" (L'Heureux-Dube in *R. v. Ewanchuk*, 1999). Despite Justice L'Heureux-Dube's focus on mutuality as a standard for heterosexual encounters, this line of reasoning is constructed from, and also perpetuates, discourses of normative heterosexuality in which male aggression and female submission is constructed as natural features of heterosexual interactions (Gotell, 2002). The judgments put forth by these legal actors entail legal rationalities that link with moral and normative issues in the governance of sexual assault. Legal rationalities link with moral questions in this specific case for it is assumed that the judge knows what constitutes virtuous and responsible conduct. Both the woman's behaviour and lifestyle (according to the rationalities put forth by Justice McClung) and the man's sexual conduct and behaviour (following Justice L'Heureux-Dube's line of reasoning) are presumed to fall short of 'normative' and 'appropriate' conduct in this case.

Legal operations and rationalities embedded within the juridical field not only emerge from, but also reproduce, normalizing discourses. Similarly, Carol Smart (1995) found, in her study on prostitution, that the conceptualizations deployed by magistrates perpetuate, and are grounded in, normalizing discourses of female, and arguably male, sexuality. Drawing on Foucault, Smart clarifies what she means by certain normalizing discourses as:

Certain discourses [that] create a norm of behaviour or personality types against which other behaviours or types are judged and calibrated. This gives rise to mechanisms to change or reform the behaviour or type and the individuals who behave in this fashion are judged according to their nearness to or distance from that which is defined as the norm (Smart, 1995: 49)

The legal rationalities put forth by Justices McClung and L'Heureux-Dube specifies taken-for-granted assumptions of normative heterosexuality, albeit in different ways. Whereas Justice L'Heureux-Dube stresses mutuality in sexual interactions and Justice McClung highlights masculine hormonal instincts, both lines of reasoning construct male sexuality as naturally aggressive, and female sexuality as naturally submissive as natural elements of heterosexuality. Although Justice L'Heureux-Dube condemns the man's behaviour and Justice McClung excuses his behaviour, both rationalities construct female and male sexuality as existing outside of cultural influences. Both lines of reasoning are accomplished through a legal process that discursively constructs not only a type of Woman (as in the case of Justice McClung), such as the single mother or the promiscuous woman, but also constructs a homogeneous category Woman (in terms of a passive sexualized body), understood in contradistinction to Man (in terms of a natural sexual aggressor) (Smart, 1995: 194). The latter is exemplified in both Justices rationalities. Both forms of legal rationalities are grounded in notions of normality, which is used as a standard for measuring and evaluating the conduct of both the man and woman.

The sexual autonomy of women is further at issue in R. v. Esau (1997). The theory of the Crown was that the complainant was too drunk to consent as she could not remember much of what had gone on at the party, and that her last recollection before going to sleep was climbing the stairs to her bedroom. The complainant testified that she had no memory of anything from the time she went to her bedroom until the next morning

when she awoke and had realized that she had engaged in sexual intercourse. Although she could not remember what occurred, the complainant testified that she would never knowingly have consented to intercourse with the accused because they were second cousins. The theory of the defense was that she had in fact consented verified by her (alleged) active participation.

The Supreme Court, by majority, upheld the Court of Appeal's ruling that there was an 'air of reality' to the defense of honest but mistaken belief in consent and that, notwithstanding the failure of defense counsel to raise the issue, the trial judge was obliged to put the defense to the jury. At issue in this case is the meaning of consent, which is inextricably linked to commonsense notions and normalizing discourses of heterosexuality. Justice Major, writing for the majority of the Supreme Court, argues that the accused's evidence amounted to more than a bare assertion of belief in consent in three specific ways. First, the accused described specific words and actions on the part of the complainant that led him to believe that she was consenting. Second, the complainant's evidence did not contradict that of the accused, as she cannot remember what occurred after she went to her bedroom. And third, there was no evidence of violence, struggle or force. Put frankly, the complainant's failure to remember the events is no evidence of her denying consent (Justice Major in *R. v. Esau*). Once again, these legal rationalities are aligned with techniques for governing uncertainty that are rooted in, and perpetuate, the construction of normalizing gender discourses. It is implied that by rationalizing this judgment in terms of 'what could have happened' makes it easier to raise the defense of honest but mistaken belief in consent. This line of reasoning is derived from practical experiences that entail commonsense notions of both consent and

heterosexuality. The absence of any signs of violence or force combined with descriptions of the woman's body and actions depicts a commonly held view of consent as naturally given or present, unless of course it can be 'proved' otherwise. This is a clear example of how various legal rationalities make sense of notions of consent; notions that are aligned with understandings of femininity as naturally submissive and masculinity as naturally aggressive.

The legal rationalities of the majority court exemplify the complex processes involved in constructing gender differences; legal processes that can be conceptualized as 'technologies of gender' (deLauretis, 1987 cited in Smart, 1995:191). Understanding law as a technology of gender illustrates the role played by legal processes and rationalities in constructing gender differences in a dichotomous relation that result in fixed gender differences between men and women (Smart, 1995). The majority of judges are of the view that a number of things could have happened during the period in which the woman had no memory. But what is interesting is that the possibility of the woman's non-consent, either in the form of unconsciousness or an explicit 'no', is not raised as an option by the majority court.

Justices L'Heureux-Dube and McLachlin, dissenting on this issue and writing for the minority court, are of the view that the defense of honest but mistaken belief in consent cannot be raised in the case of an unconscious or incoherent complainant. Furthermore, Justice McLachlin claims that a person who is unconscious or unable to communicate is incapable of indicating deliberate voluntary agreement. Justice L'Heureux-Dube suggests that to put this defense to the jury "would require assumptions about the behaviour of severely intoxicated women which have no demonstrated basis in

reality and could potentially be seen as biased or stereotypical.” Therefore, according to this ruling, the rationale asserted by the majority court – that the complainant’s drunkenness and lack of memory is sufficient to raise the defense of honest but mistaken belief in consent – depends strictly on speculation, which undermines the sexual autonomy of intoxicated women. This line of reasoning alerts us to the various ways that legal judgments not only bring into being, but also convey, discursive constructions of a type of Woman (Smart, 1995), specifically in this case an intoxicated Woman. The emphasis on lack of force, struggle or violence in the majority’s reasoning both constructs masculine aggression as a natural feature of heterosexuality and undermines the sexual autonomy of the woman by assuming that consent could be reasonably, although sometimes mistakenly, assumed if there was no evidence of non-consent (Sheehy, 1996), that is if force was not present.

The reforms of Bill C-49 codified a definition of consent as “voluntary agreement” and specified situations that do not constitute consent. The intent of this legislation, in part, was to clarify the line between consent and coercion and to shift the emphasis of sexual assault law away from the subjective perceptions of the man (Gotell, 2002). Christine Boyle (1994) suggests that visible standards of non-consent, those circumstances listed in section 273.1(2), are susceptible to critique as they reflect dominant legal rationalities premised on masculine interests. What is problematic with her critique is that it presumes an essential difference between masculine and feminine interests. Rather than questioning perhaps the ethical or normalizing dimensions of the circumstances that negate consent, she reduces these rationalities to an essential difference between men and women. Furthermore, Boyle (1994) suggests that these

standards of non-consent are itemized in terms of illegitimate pressures and influences. It follows then that other circumstances, which are not listed, are consequently considered as possible legitimate pressures (Boyle, 1994). She comments:

..... as the list now stands, one submits, rather than consents, where force is present. One probably consents, rather than submits, where one fears male disapproval, removal of economic support, the withdrawal of companionship in a world where heterosexual couples are the social norm, and so on (Boyle, 1994:141).

In describing legitimate and illegitimate pressures of sexual interactions, there is a tendency to invoke an image that all women experience sexual assault the same. When we apply Christine Boyle's critique of section 273.1(2) to the case of *R. v. Esau* (1997), it becomes apparent that the majority court omitted considerations of larger social and political factors. In rationalizing their judgment in terms of 'a lack of evidence' regarding non-consent, they failed to recognize other situations in which power is exploited in heterosexual relationships.

Consent and Broader Socio-Political Concerns

Various feminist scholars have examined the meaningfulness of consent within the dominant discourses of heterosexuality. Classical radical feminists argue that heterosexuality is a social and political institution shaped to serve the dominant interests in a patriarchal society and is forced upon women without their choice (MacKinnon, 1987; Dworkin, 1987; Pateman, 1988; Rich, 1989). These perspectives are valuable in understanding the historical, social, and political factors aligned with notions of consent. They show clear examples of the obstacles that face women in heterosexual relationships

[such as gender inequality (MacKinnon, 1987), the idealization of romance (Firestone, 1970), the marriage contract (Pateman, 1988)]. Although these perspectives fail to address the social fluidity of women's sexual experiences and agency (Valverde, 1989; Segal, 1994; Carrington et al., 1996; Smart, 1996; Vanwesenbeek, 1997; Alder, 1998), they have contributed to a diverse range of research that has examined how various operations of law reproduce and maintain dominant discourses of heterosexuality.

Within the context of sexual assault, dominant legal procedures and legal rationalities have been criticized for being structured around and constitutive of attributes that have long been associated with men, such as objectivity, rationality, and abstract judgment (Smart, 1995; Tomm, 1992). It has been suggested that legal procedures not only disqualify, exclude and disempower women's experiences and perspectives (Alksnis, 2001; Smart, 1995; Kelly et al, 1991) but are reliant upon 'expert' testimony to legitimate women's experiences (Hengehold, 2000:194). Empirical research involving the examination of court transcripts reveals that the questions posed by prosecution and defense attorneys are based upon false assumptions that entail deep-rooted myths and stereotypes about the nature of sexual assault (Alksnis, 2001). These include assumptions such as "a sexually experienced woman is more likely to consent to sexual activity; a sexually experienced woman is less likely to tell the truth under oath; and the implied corollary of all this, that only 'chaste' women are entitled to protection from sexual assault" (Bowland, 1994:252). These assumptions arise out of taken-for-granted assumptions of normative heterosexuality and gender identity discourses. However, legal rationalities and operations of law that rely on, and are dependant upon, these assumptions actively contribute in the production and dissemination of constructing

normative discourses of sexuality and gender identities (Smart, 1995). Understanding consent in terms of normalizing discourses, and making judgments based on such understandings, contributes to larger cultural beliefs that view masculinity as naturally aggressive and femininity in terms of a sexualized, submissive body.

Judicial actors are not blind to many of these criticisms regarding legal proceedings of sexual assault. Judicial acknowledgments of these criticisms include, for example, recognizing the gendered nature of sexual assault, the role played by legal actors in invalidating women's experience, and the unsoundness of objective and gender-neutral legal procedures. Therefore, it is common for actors in the juridical field to make reference to and at least acknowledge equality and justice concerns in various legal rationalities. Justice L'Heureux-Dube (writing for the majority court), at the outset of her judgment in *R. v. Ewanchuk* (1999), discusses the prevalence of sexual assault against women in Canadian society and the international prohibitions against violence against women, specifically the Convention on the Elimination of All Forms of Discrimination Against Women. This is consistent with Parliament's efforts to frame legislation that recognizes sexual assault as a unique offence of gender inequality, as it states:

WHEREAS the Parliament of Canada is gravely concerned about the incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual assault against women and children.

Justice L'Heureux-Dube further defines violence against women as "much a matter of equality as it is an offence against human dignity and a violation of human rights." In her discussion she recognizes the general criticisms of the current criminal justice process, stating that "the law and legal doctrines concerning sexual assault have acted as the principle systemic mechanism for invalidating the experiences of women and children."

To take it a step further, Justice L-Heureux-Dube asserts that the traditional view of the legal system as neutral, objective and gender-blind is not defensible. She advocates for a re-examination of the existing doctrines that have preserved male interests at the expense of women and children. It appears that some juridical actors are increasingly acknowledging recurring problems with law and operations of law, specifically the lack of equality and justice jurisprudence in legal rationalities and legal proceedings dealing with sexual assault offences. However, there seems to be little engagement with both dominant understandings of normative heterosexuality and gender and the various roles played by the courts in perpetuating these normalizing discourses. By simply focusing on competing legal rights and equality jurisprudence, such as the right to a fair trial and the right to privacy and security of person, the courts and some feminist discourse fall short in questioning or denaturalizing normative constructions of sexuality and gender (Smart, 1995).

CHAPTER IV

Judicial Determinations of Consent: Expert Knowledge, Responsibilization and Legal Constructions of 'Normativity'

Consent, Credibility and Charter Politics: The Importance of Expert Knowledge

Interrogations of consent are structured within legal rationalities and procedures that focus on discourses of credibility and Charter rights. The various ways that women are constructed as 'credible' or 'non-credible' plays an important role in how the courts balance the Charter rights of individuals, specifically the right to privacy, the right to equality without discrimination, and the right to a fair trial. Legal constructions of women's credibility and character in sexual assault trials often involve the use of expert knowledge. Requesting the personal, therapeutic and counseling records of rape victims is common practice in legal proceedings of sexual assault. The disclosure of such records is determined by the court in light of individual rights guaranteed by the Charter of Rights and Freedoms.

The reliance upon expert testimonies and counseling records within these legal proceedings characterizes a neo-liberal strategy of government. Neo-liberal strategies rely upon professions of 'experts of truth' and the concepts that they employ, such as "normality and pathology, danger and risk, social order and social control, and the judgments and devices which such concepts have inhabited" (Rose, 1999:30). Various scholars suggest that there has been a shift from older occupations, such as medicine, law and academics, to newer occupations of accountancy, expert consultancy, and audit (Rose, 1996; Brint, 1994). These newer occupations include the emergence of the 'psy' knowledges in the post-Enlightenment period in the West, which marks a shift in the

ways that individual conduct was regulated and governed (Rose, 1999). This shift involved the construction of individuals who would take responsibility for their individual conduct in order to achieve self-happiness and self-realization. Experts began to play a critical role in specifying ways of improving one's habits, conducts, lifestyles, uncertainties or mistakes (Rose, 1999). The popularity, and arguably the necessity, of experts in specifying self-improvement initiatives to individuals has led to countless numbers of expert knowledges that are used in diverse ways for individual reasons. Experts are given authority and power to assess and render judgments on individual conduct and behaviour. This is achieved through a process that merges practices of monitoring and evaluating conduct with specialized languages and ethical codes (Rose, 1999). The production and circulation of expert knowledges is increasingly through "enumeration, calculation, monitoring and evaluation" (Isin, 2000:155). It is common practice for professionals in a whole range of fields, such as psychiatrists, psychologists, rape crisis centre workers, to document the life histories, past experiences and oral testimonies of clients. This includes keeping notes of all meetings, the maintenance of files and information systems, and written statements reflecting their grounds for a particular decision or diagnosis (Rose, 1999). These information systems, in turn, can be disclosed to the court and used as evidence for the defense in sexual assault trials.

Characteristic of expert knowledge is its ability to make claims of objectivity and neutrality and hence to make claims of truth. Expert knowledge that makes claims to truth facilitates the deployment of power (Smart, 1995). Requesting the therapeutic and counseling records of women in sexual assault cases is an attempt by the courts to access the Truth of women's testimonies and narratives, and hence her (in)credibility, believed

to be held in the records of experts. In claiming scientificity, expert knowledge is accorded more status and more value than other knowledges (Smart, 1995), such as women's voices, by the juridical field. Other 'non-science' knowledges are subjugated and marginalized by the courts, illustrating the non-value and non-trueness of these other knowledges.

In *R. v. Osolin* (1993)¹⁴ the complainant expressed to her therapist a fear that her "attitude and behaviour may have influenced the man to some extent and [that she] is having second thoughts about the entire case." The defense counsel sought to cross-examine the complainant on these records. He indicated that the cross-examination would be directed toward "what kind of person the complainant is." The Supreme Court refused to permit cross-examination for this purpose. However Cory J., writing for the majority, ruled that it would have been appropriate to permit cross-examination on the medical records to determine if "they would throw any light either on a possible motive for the complainant's allegation that she was the victim of sexual assault or with regard to her conduct which might have led the accused to believe that she was consenting to sexual advances". This legal rationality contributes, once again, to the discursive construction of the category Woman (Smart, 1995). She appears this time as the malevolent and heinous woman whose natural disposition is to fabricate stories of sexual assault. It follows then that her conduct and behaviour must have led the man to believe she was consenting. By focusing on the conduct and behaviour of the woman, this legal rationality contributes both to the sexualization of the woman's body (in which she is only seen as a body) and to the normalization of the natural sexual male aggressor.

¹⁴ *R. v. Osolin* [1993], 4 S.C.R. 595

Credibility is central to the legal rationalities of the majority court. What is interesting in this judgment is the assumption that false allegations are more common in sexual assaults than in other offences. L'Heureux-Dube (writing for the minority court), dissenting in this case, points out that "myths and the extraordinary need for caution with respect to credibility of complainants continue to play a role in the prosecution of sexual assaults". To illustrate their persistence she highlights that, in cases other than sexual assault, it is rare for medical records to be deemed relevant to an issue in trial as they are generally marginal to the central issue at trial. An extensive case law search revealed very few cases other than cases involving sexual violence or offences against young children where defense sought access to third party records (Karen Busby: 1998). However, in sexual assault cases access to a woman's personal and therapeutic records is necessary, and in some cases deemed fundamental, in providing the accused with a fair trial. The importance of women's counseling records is exemplified by the majority court in *R. v. O'Connor* (1995)¹⁵ which states that "the sheer number of cases in which such evidence has been produced supports the potential relevance of therapeutic records". This statement is directly opposed to the dissenting minority determination that therapeutic records will only be relevant to the defense in rare cases.

The differences between the dissenting and the majority judgments demonstrate diverse and controversial understandings of the constituents of a fair trial. It is often the case that these differences arise, and resurface, when judicial actors address issues regarding the disclosure of women's personal records. These judicial debates are framed

¹⁵ *R. v. O'Connor* [1995], 4 S.C.R. 411

within diverging rationalities that seek to construct ‘fair’ trial procedures and operations of law. In the case of *R. v. O’Connor* (1995), the majority court stressed the man’s right to a fair trial over the privacy rights of the woman, whereas the minority court focused on the harmful and invasive effects for women that result from disclosing personal information.

It is common for the judiciary to address the legal constituents of a fair trial in the decision-making processes. This is in line with Parliament’s efforts to enact legislative reforms that outline various factors that contribute to the fairness of legal proceedings. Boyle and McCrimmon suggest that there are signs of evolving recognition, on behalf of Parliament and the courts, of the need for “analysis of co-existing constitutional rights of all persons whose status and interests are affected by criminal trials” (1998:201). In *R. v. Crosby* (1995)¹⁶ and in *R. v. O’Connor* (1995), judicial attention is paid to the scope of what constitutes a fair trial. Justice McLachlin, writing for the dissenting minority court in *R. v. O’Connor* (1995), argues that a fair trial takes into account “not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered.” In contrast, however, the majority court argues their judgment in terms of competing legal rights, in which the possibility of a miscarriage of justice is framed by unduly restricting the accused’s ability to make full answer and defence. Understanding fairness in terms of a man’s right to a fair trial is, however, reconstructed in more recent Supreme Court decisions. For

¹⁶ *R. v. Crosby* [1995], 2 S.C.R. 912

example, in the recent *R. v. Darrach* (2000)¹⁷ judgment, all the judges of the Supreme Court were in concurrence in upholding the current standard regarding the use of women's past sexual history, as outlined by section 276 of the Criminal Code. Justice Gonthier, writing for the Supreme Court, states:

One of the implications of this analysis is that while the right to make full answer and defense and the principles against self-incrimination are certainly core principles of fundamental justice, they can be respected without the accused being entitled to "the most favourable proceeding that could possibly be imagined". Nor is the accused entitled to have procedures crafted that take only his interests into account. Still less is he entitled to procedures that would distort the truth-seeking function of a trial by permitting irrelevant and prejudicial material at trial.

Gonthier continues to explain that fairness of sexual assault trials is determined by assessing the trial process as a whole. Therefore, it is the view of the majority court that excluding misleading evidence enhances the fairness of legal proceedings. These legal rationalities reaffirm Justice L'Heureux-Dube's view (writing for the majority court) in *R. v. Crosby* (1995), which asserts that the right to a fair trial does not mean that the accused is entitled to the most beneficial procedures possible. Judges must, she argues, undertake a balancing exercise that is sensitive to many differing and potentially conflicting interests.

This balancing exercise is reflected in the preamble of Bill C-49, which exemplifies Parliament's effort to enact sexual assault legislation for the evident purpose of governing the judiciaries' response to sexual assault offences. The response of judicial actors must be consistent with the principles of fundamental justice, which includes the vision of an egalitarian society. The preamble states:

¹⁷ *R. v. Darrach* [2000], 2 S.C.R. 443

WHEREAS the Parliament of Canada wishes to encourage the reporting of incidents of sexual violence or abuse, and to provide for the prosecution of offences within a framework of laws that are consistent with the principles of fundamental justice and that are fair to complainants as well as to accused persons.

Notwithstanding these examples of judicial attention to constitutional rights of both men and women, Boyle and MacCrimmon (1998) argue, in their analysis of the constitutionality of Bill C-49, that the courts pay occasional but unreliable attention to the equality implications of sexual assault law. Justice Cory, writing for the majority court in *R. v. Osolin* (1993), asserts that the right to cross-examine witnesses is fundamental to providing a fair trial to an accused as it “is the ultimate means of demonstrating truth and of testing veracity.” He found that once a witness’s medical records are admitted, cross-examination must then be allowed on any information acquired from the records which may be relevant to an issue in the case. It is critical to point out that truth, from a feminist understanding of governance, cannot be understood as separate from power. We can no longer take truth claims for granted but rather we must recognize them as socially constructed, historically specific, knowledge claims that reinforce, and at times reproduce, relations of power. As noted in *R. v. Osolin* (1993), legal rationalities presume that truth can be discovered by following fair trial procedures, which includes the right to cross-examine witnesses. Any sense of confusion or uncertainty on behalf of the complainant consequently is interpreted by the courts as ‘relevant’ and is often admitted as evidence.

The court affirmed in *R. v. Ewanchuk* (1999) that determinations of consent are “only concerned with the complainant’s perspective. The approach is purely subjective”. Although this rationale recognizes the subjective and personal nature of consent, it

follows that operations of law can discover the truth through interrogating a woman's conduct and character. Following Justice Major (writing for the majority court) in *R. v. Ewanchuk*, a woman's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct. The question at this stage is purely one of credibility, and whether the totality of the complainant's conduct is consistent with her claim of non-consent. Expert knowledges, specifically women's counseling or therapeutic records, are frequently sought by defence counsel to alert the judiciary to any ambiguous or contradictory conduct by the woman. This in turn is constructed as relevant information; its disclosure necessary in providing the accused with fundamental Charter rights, particularly his right to a fair trial.

In *R. v. O'Connor* (1995), Justice L'Heureux-Dube, writing for the dissenting minority court, claims that "the main reason personal records have been sought by defense counsel in sexual violence cases are to attack complainants' credibility, motive, and character". Requesting and disclosing expert knowledge, specifically the counseling and therapeutic records of women, often results in assertions of 'false memory syndrome' suggesting that women's accounts and memories of sexual assault are deluded (Gotell, 2001), thereby destroying the credibility of women. Counseling and therapeutic records are assumed necessary to sort out the truth. The strategy of requesting and interrogating the counseling records of women has furthermore been formalized and institutionalized by the 'likely relevance' test in sexual assault cases (Denike, 2000:155-156).

Consent, Expert Knowledge and the Construction of Legal Relevancy

The judiciary assigns key roles to experts in constructing 'relevant' evidence for the defense. Records held by third parties, specifically those records held by a woman's counselor or therapist, are sought after by the defense in an attempt to 'prove' the likelihood of a woman's consent to sexual activities. The legislative amendments of Bill C-49 set the legal parameters for determining the admissibility of a woman's past sexual history as evidence in sexual assault trials. To ensure that the rights of women are respected and upheld in legal proceedings, Bill C-49 indicates in section 276(1) that evidence regarding a woman's past sexual history is not admissible to support an inference that the woman is more likely to have consented to the sexual activity in question or that the woman is less worthy of belief. However, this general prohibition is not an absolute shield (Tang, 1998) as it is subject to the exception of section 276(2), which articulates the basis that sexual activity evidence may be admitted. The legal relevancy of a woman's past sexual history is determined by judicial discretion, in which the judge evaluates the evidence in light of the conditions outlined by section 276(2).

This section states:

[N]o evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines that the evidence:

- a) is of specific instances of sexual activity;
- b) is relevant to an issue at trial; and
- c) has significant probative value that is not substantially outweighed by the danger and prejudice to the proper administration of justice.

In determining whether the evidence ought to be produced to the defense, the judge must consider a list of factors outlined in section 276(3), such as the interest of justice, including the right of the accused to make a full answer and defense; the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury; the potential prejudice to the complainant's personal dignity and right to privacy; the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and any other factor that the judge, provincial court judge considers relevant. Although these legislative amendments specify substantive and procedural issues that must be taken into account by the judges in assessing the admissibility of evidence, very little is said regarding the definition of what constitutes 'relevant' evidence or the responsibilities and obligations of the defense in demonstrating or establishing the relevancy of evidence to be considered by the judge or justice.

Recognizing the need for procedural guidance, the British Columbia Court of Appeal in *R. v. O'Connor* (1993) implemented a two-stage procedural test for determining the relevance of records held by third parties. The procedure, referred to as the 'likely relevance' test, was accepted, though slightly modified, by the Supreme Court of Canada in 1995 (Denike, 2000:155). At the first stage, the defense must demonstrate 'likely relevance' defined as 'a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify' (*R. v. O'Connor*, 1995). The majority court emphasized that the burden on the accused at this initial stage of the relevancy test should not be an onerous one. If the records pass the first stage, the judges of the Supreme Court agree that they are then released to the trial judge who is to

determine whether or not they are to be disclosed to the accused by considering those factors outlined by section 276(3).

The majority of judges devised what it saw as a 'fair' scheme for balancing the privacy rights of complainants with the fair trial rights of the accused. However, these legal rationalities conceptualize a miscarriage of justice in terms of limiting the accused's access to relevant information. The majority court states:

In recognizing that all individuals have a right to privacy which should be protected as much as reasonably possible, we should not lose sight of the possibility of occasioning a miscarriage of justice by establishing a procedure which unduly restricts an accused's ability to access information which may be necessary for meaningful full answer and defense.

This quotation clearly illustrates a legal rationality that views individual rights as directly opposed and in competition with one another. The legal construction of relevancy, therefore, plays a critical role in gendering individual rights and liberties in cases of sexual assault. This is well exemplified by the common tendency of the judiciary to frame women's rights within the discourse of privacy and men's rights in terms of fair trial procedures. Constructing legal relevancy in terms of competing individual rights perpetuates a 'unidimensional approach' (Denike, 2000:152) to fundamental justice that is rooted in common understandings of natural gender differences and inequalities between men and women in cases of sexual assault. This line of reasoning maintains a belief in the essential differences between men and women, in which men's rights are accorded more significance or status in terms of the right to a fair trial and women's rights are relegated to a subordinate status in terms of the right to privacy.

In considering the history of liberal legal discourse, it becomes apparent that the right to a fair trial has been of pioneering importance to law reformers since at least the 16th century (Dauvergne, 1994: 300). Equality rights and the right to privacy, on the other hand, are comparatively younger and hence are lower on the 'historical hierarchies of rights' scale (Dauvergne, 1994: 300). Christine Dauvergne suggests that the principles of fundamental justice, those outlined by section 7 of the Charter of Rights and Freedoms, are still tied to the heritage of 'due process rights', which are only available to the accused (1994:300). It is therefore very difficult for feminists and women to challenge the rights to a fair trial discourse by using principles that are based on understandings of fundamental justice, such as rights to equality, privacy and security of person, since these claims are not part of the same order of rights (Dauvergne, 1994).

In contrast to the majority courts ruling in *R. v. O'Connor* (1995), specifically in contrast to their emphasis on the accused's right to a fair trial, Justice L'Heureux-Dube, writing for the dissenting minority court, addressed the discriminatory beliefs and the prejudicial effects for women in admitting personal records. She argues that when judicial actors are deciding to order production of private records, the court must exercise its discretion in a manner that is respectful of Charter values. She urges the court to be conscious of the injurious effects of production, which may include 'negative effects on the complainant's course of therapy, threatening psychological harm to the individual concerned and thereby resulting in a concomitant deprivation of the individual's security of person'. The effect of disclosing private records is also discussed in an earlier case by L'Heureux-Dube [in *R. v. Osolin*(1993)]. She states that if "people are aware that personal records can be obtained to attack the credibility of a witness, they may be

reluctant to seek needed and valuable treatment if there is any possibility that they may be called to testify at trial". In order to ensure fundamental values to individuals in our society, specifically notions of personal autonomy, security and dignity, individuals must have the ability to control personal information, including the purpose and manner of its disclosure.

The implementation of this two-stage relevancy test by the Supreme Court was recognized as disastrous to both women who have experienced sexual assault and counselors who work with them (Busby, 1998). Determining the relevancy of evidence does not occur through neutral and objective standards of assessment. Standards of relevancy are produced and constructed in ways that arguably concur with normative constructions of a type of woman who has sought counseling for sexual assault (Smart, 1995). Thus in legal discourse the woman who has sought counseling is at times constructed as illogical, unreliable, incredible and naturally vindictive; thereby making her more likely to fabricate stories of sexual assault. Margaret Denike exemplifies the presence of this type of woman within legal constructions of relevancy by stating:

The judicial practice of "balancing" rights is always at risk of favouring an accused's rights over women's collective rights since the scales of justice are already tipped against her: the test turns on the presumption that rape complainants, and especially those who have sought any form of counseling, may or may not be deluded, falsely misrepresenting events, or otherwise unable to speak truthfully about their sexual experiences. Counseling and therapeutic records are thus assumed necessary to sort out the truth (2000:155)

The testimonies and records of expert counselors consequently exploit the myths regarding women's lack of credibility and responsibility when it comes to sex (Denike, 2000) and further establishes the deep-rooted myths and stereotypes of sexual assault. To be a credible complainant "one must assume the standpoint of the rational coherent legal

subject; one must be able to articulate a straightforward account that meets the test of historical 'Truth'; and one must be able to squeeze the ambiguities and complexities of coercive heterosex into the binary logic of the consent/coercion dichotomy" (Gotell, 2001:332). Judicial determinations of relevancy are always made through 'specific policy choices that reflect the subjective perspectives and contextual assessments of the people or institutions [or discourses] constructing these standards' (Dawson, 1998; 190). These standards not only are rooted in taken-for-granted assumptions of women who have sought counseling but also perpetuate normalizing discourses of sexual assault.

Determining whether evidence is logically probative to an issue at trial entails various types of expert knowledges that inform the judiciary in making logical inferences regarding a woman's behaviour, credibility and, in the end, her consent. Neo-liberal strategies of government assign key roles to experts in shaping the private responsibility of individuals. Experts specify ways of conducting one's private affairs that are desirable because they are deemed 'rational' and 'true' (Rose, 1999:74); knowledge that is accessible through neutrality and impartiality (Isin, 2000). Expert professionals constitute individuals as autonomous individuals capable of making the right choices (Brint, 1994). Relationships between individuals and experts are therefore organized and regulated through acts of choice rather than through coercion and force (Rose, 1993). Organizing expert and individual relationships through the subjective choices of individuals is well exemplified by the common practice of women who have survived sexual assault to participate in therapeutic programs out of their own will – as acts of self-empowerment without coercion by the courts (Cruikshank, 1994:330). The function of such practices

constructs a space of safety and security for women in which their experiences of sexual assault can be told and understood.

Consent, Expert Knowledge and Responsibilization

Women's efforts to communicate and share their experiences of sexual assault with others are threatened and subject to interrogation if personal counseling and therapeutic records are disclosed to the judiciary. Disclosing therapeutic and counseling records of women consequently shifts the focus away from men and their responsibility for violence against women to the behaviours and actions of women that are believed to have led the perpetrator to commit the crime (Gauthier, 1999). The legislative amendments of Bill C-49 were designed to reduce the number of occasions in which evidence of a woman's sexual character would be considered relevant and admitted as evidence in cases of sexual assault. Judges were given substantive and procedural guidelines to use, outlined by the amendments of Bill C-49, in assessing the relevancy of a woman's past sexual history.

Judges are given a critical role in assessing the content of counseling records and determining the admissibility of such records as evidence for the defense (Gotell, 2001). In *R. v. Osolin* (1993), the trial court admitted the woman's mental health records for the limited purpose of having an expert evaluate them to determine if the woman was competent to testify under oath. However, once the medical records were disclosed, the defense counsel sought to cross-examine the complainant on those records, specifically on the following notation:

The hearing into the sexual assault has been postponed until September. Linda now wishes that it had not been postponed. She is concerned that her attitude and behaviour may have influenced the man to some extent and is having second thoughts about the entire case (July, 9, 1987).

The trial judge refused to permit counsel to cross-examine on this note as this would be, in his opinion, a violation of the woman's right to privacy. The majority of judges at the Supreme Court level overturned the decision of the lower court and ordered a new trial. The majority of judges were of the view that the trial judge should have permitted cross-examination on the woman's medical records, specifically the notation indicating that she was concerned that her "attitude and behaviour may have influenced the man to some extent". The majority court argued that they would have allowed the cross-examination for the purpose of determining if there was an air of reality to the accused's defense of mistaken belief in the woman's consent or evidence to support an allegation of fabrication. Cory J., writing for the majority, suggests that a court of appeal confronted by an unexplored avenue of cross-examination, which might have led to a reasonable doubt as to guilt should direct a new trial to avoid a miscarriage of justice. This rationality was held in light of the Court of Appeal transcripts, which indicated that the accused admitted that the complainant made some protests over the course of the evening, that he overrode her complaints about her nakedness and that he tends to adopt the attitude that "no" means "yes" until there is a clear indication of no consent (cited by McLachlin). Nevertheless, the majority court allowed the appeal and ordered a new trial.

In contrast to the majority court's reasoning, Justices La Forest and L'Heureux-Dube (writing for the dissenting court) clarify the level of discretion that judges possess in admitting or excluding evidence in cases of sexual assault. They state, "[t]rial judges

possess the undoubted discretion to both exclude evidence and limit cross-examination on matters which, although arguable relevant to the issue, are outweighed by their potential to prejudice the trial of the issue.” The minority court, dissenting on this issue, is of the view that the purpose of defense counsel’s cross-examination was to attack the complainant’s credibility in a general way “by putting before the jury every difficulty in her personal life in the hope that they would then draw negative inferences about her character and credibility.” By allowing the cross-examination on the medical records the judge is at risk of drawing impermissible inferences that rely on myths about the credibility and character of sexual assault victims (L’Heureux-Dube in *R. v. Osolin*, 1993). Furthermore, the rationale behind the majority’s judgment – the emphasis on the defense of mistaken belief in consent versus the woman’s propensity to fabricate the sexual assault – shifts the responsibility for ensuring consent away from men to the credibility and personal integrity of women.

Within the broad context of legal proceedings, the general rule is that expert knowledge is admissible to furnish the court with technical or scientific information which is likely to be outside the experience and knowledge of the judge and jury. However, Margaret Denike (2000) suggests that little foundation is required to expose confidential records to the court in sexual assault cases. Any records, including almost all counseling records, that touch on the assault or any other abuse are systematically ordered to be disclosed to the judge (Denike, 2000).

In *R. v. O’Connor* (1995), the majority argued that “the sheer number of cases in which such evidence has been produced supports the potential relevance of therapeutic records”. Justices Lamer and Sopinka, writing for the majority, clearly assert their

disagreement with the claim that therapeutic records will only be relevant to the defense in rare cases (as held by dissenting Justice L'Heureux-Dube). They attempt to clarify what they mean when they speak of 'relevant evidence.' In their words, "when we speak of relevance to "an issue at trial," we are referring not only to evidence that may be probative to the material issues in the case (e.g. the unfolding of events) but also to evidence relating to the credibility of witnesses and to the reliability of other evidence in the case" (Justices Lamer and Sopinka in *R. v. O'Connor*, 1995). They continue to illustrate a number of ways in which information contained in third party records may be relevant in sexual assault trials. These include third party records that "contain information concerning the unfolding of events underlying the criminal complaint; that reveal the use of therapy which influenced the complainant's memory of alleged events; and that contain information that bears on the complainant's "credibility", including testimonial factors such as the quality of their perception of events at the time of the offence, and their memory since" (Lamer and Sopinka in *R. v. O'Connor*, 1995).

This style of reasoning highlights the critical role that third party records play in legal proceedings dealing with sexual assault offences. Following Gotell (2001), 'the presumption in favour of relevance that informs the majority's test means that women's efforts to express or communicate their experiences of assault in virtually any forum can be subject to consumption by the courts' (2001:325). It is interesting to note that while Justices Lamer and Sopinka (writing for the majority) make great efforts to clarify what constitutes 'relevant' evidence in legal proceedings of sexual assault they do not address the many ways in which women's private records are 'irrelevant' to the matter at trial.

They do however say that the “mere existence of therapy records is insufficient to establish the relevance of those records”.

The ease of accessing women’s counseling records exemplifies various ways that women are responsibilized by the courts. A woman’s behaviour is construed as representative of individual responsibility, evidenced by familiar sound-bit statements such as ‘no means no’ and ‘just say no.’ The absence of a verbal measure of non-consent allocates blame, and hence justifies blame, as her responsibility for her sexual violation. Legal processes dealing with determinations of consent consequently transform women’s counseling and therapeutic records into evidentiary archives in sexual assault cases (Gotell, 2001). Attention is focused on women’s actions and behaviours, or the lack thereof, which may have led the man to commit the sexual offence. Justice L’Heureux-Dube (writing for the dissenting minority court) points out in *R. v. O’Connor* (1995) that requesting the counseling and therapeutic records of women rests on the assumption that the ‘personal and psychological backgrounds and profiles of complainants of sexual assault are relevant as to whether or not the complainant consented to the sexual contact, or whether the accused honestly believed that she consented.’ In a number of cases, Justice L’Heureux-Dube has warned the court that therapeutic records should not become a tool for circumventing section 276: “we must not allow the defense to do indirectly what it cannot do directly” [see *R. v. Osolin*, 1993; *R. v. O’Connor*, 1995; *R. v. Darrach*, 2000). Women’s statements and testimonies, as evidenced in their counseling records, are interrogated for inconsistency, cognitive avoidance, memory shaping, and other responses such as self-blame (Gotell, 2001). The narratives and circumstances describing a woman’s sexual assault are therefore interpreted, and at times interrogated, by the

defense as incredible, misinformed, and even fabricated. Not only does this trivialize and marginalize women's experiences of sexual assault, but it also erases men's responsibility for ensuring a woman's consent.

Consent and Responsibilizing the Individual through Communication

Responsibilizing individuals is part of a neoliberal governing strategy that governs society "through the regulated and accountable choices of autonomous agents" (Rose, 1993:298). These governing strategies aim to subjectify individuals as rational citizens actively involved in governing their own conduct. In other words, responsabilization strategies rely on the individual 'self' to govern and control their own behaviour and conduct. This is achieved through modes of normalization, such as the media, religion, the role of teachers and parents, which play a critical role in constructing individuals as rational, autonomous and responsible subjects. At the centre of legal rationalities is this liberal subject who is expected to govern themselves as rational and responsible agents. Power is therefore exercised through, rather than exerted on, the active subject who is capable of choice and action (Garland, 1997). This strategy aims to construct individuals who internalize the objectives and laws of government not because of force or coercion but rather because they see it in their best interests to do so. Determinations of consent in sexual assault cases entail multiple rationalities that responsabilize and de-responsibilize individuals in various, and often controversial, ways. The ways in which responsabilization strategies are applied within legal rationalities often revolve around problems of defining, and therefore measuring, the ambiguous and subjective nature of consent. The contentions surrounding legal rationalities emerge as judicial actors attempt

to interpret and merge the actions and behaviour of the woman with the private mental state of the accused. This becomes a rather complex and contested process, however, as judicial actors rely on varying, and at times opposed, constructions of normative conduct, values and beliefs. The conduct and attitudes of both the woman and the man are then compared with, and measured against, these common standards of normalizing constructions, albeit in contested and various ways.

Central to the legal rationalities dealing with consent is the problem of definition. The meaning of consent varies considerably according to the particular discourse within which it is located. Since the enactment of Bill C-49, judicial actors have had to rethink the meaning of consent and align their rationalities with the principles set out by Bill C-49. Bill C-49 makes clear that the absence of consent can no longer be determined primarily by a verbal indication of 'no' but rather other factors, as outlined by section 273.1, must be taken into consideration in determining the absence or presence of consent. The legislative amendments of Bill C-49 intended to place greater responsibility on men to take reasonable steps to secure consent from women in sexual encounters. Judy Rebick, a member of the National Action Committee (NAC), articulated the meaning and intentions of the Bill,

I think what we're talking about is a law that says "no" means "no" and "yes" means "yes" and before you initiate sexual contact it's your responsibility to find out whether it's yes or no' (cited in McIntyre, 1994: 302).

This articulation of the Bill made national headlines, and subsequently was referred to as the 'No means No Law' (McIntyre, 1994). In section 273(2)(b), the Act specifies that an accused must have taken 'reasonable steps' to ascertain consent in order to present the defense of mistaken belief in consent. This departs from the common law position where an honest, albeit unreasonable, mistake provides a defense (Dauvergne, 1994:298). On its

face, this legislative amendment appears to be a progressive step forward for women in cases of sexual assault as it requires an accused to act responsibly by showing that he took reasonable steps to find out whether a woman was consenting. He must base his judgment, and show grounds for his judgment, regarding the woman's behaviour as consent solely on the woman's conduct at the time of the encounter in question. This provision, combined with section 273.1 is intended to reduce the occasions in which the accused could claim belief in consent based on his knowledge of the sexual history of the woman (Bowland, 1994).

Consent in the context of sexual assault is a legal concept that has both a legal and moral effect. According to Justice McLachlin (writing for the dissenting minority court) in *R. v. Esau* (1997), consent signifies voluntary agreement or concurrence to the act in question. Consequently, consent is understood as changing the rights and duties of the persons involved. Justice McLachlin cites the following to illustrate this:

Consenting, like promising, is thus performative, a behaviour that has normative consequences. To consent is to waive a right and relieve another person of a correlative duty. Consent thus alters the rights and duties between the persons who are parties to an agreement created by communication. When the rights and duties in question are not merely conventional or ethical ones, but are legal rights and duties, consent is an act that has specific legal consequences (Vandervort, 1987/88: 267 cited in *R. v. Esau*, 1997).

This passage not only illustrates the changing rights and duties of individuals that result from this legal understanding of consent, but it also highlights communication as the means by which consent is articulated. The emphasis on communication is increasingly present within legal rationalities of the Supreme Court judiciary in determinations of consent.

Similarly, in *R. v. Esau* (1997), Justice L'Heureux-Dube (also writing for the dissenting minority court) advocates a new approach to consent; one that shifts their focus

“from consent as the ‘private mental state’ of the complainant to consent as the communication of permission to engage in behaviour from which the accused otherwise has a legal obligation to refrain”. Therefore, following this perspective, the man will be held responsible for his conduct not only in circumstances where the woman was essentially saying ‘no’, but also in circumstances where the woman was essentially not saying ‘yes’. Justice L’Heureux-Dube asserts that evaluating consent and mistaken belief in consent in terms of the woman’s communication is essential if:

we are to bridge the damaging communication gap between men and women, to encourage men to ascertain whether their sexual partners are consenting, and most importantly, to prevent sexual behaviour on the part of men which is driven by the biased view and stereotypes that women are consenting when passive or incapable of communicating and do not have a full right of control over what is done to and with their bodies (as cited in R. v. Esau).

In contrast the majority court, in the same case, argued that there was plausible evidence in support of the mistaken belief in consent defense. Here the evidence comes from the testimony of the accused, in which he described specific words and actions on the part of the complainant that led him to believe that she was consenting, from the testimony of the woman, specifically that she cannot remember what occurred after she went to the bedroom due to her consumption of excessive amounts of alcohol, and the absence of resistance or violence. Although the majority court recognizes that passivity does not constitute consent, they nevertheless assert that the woman’s absence of memory has to be considered with the evidence of the accused that the woman seemed to participate willingly. They state that ‘the jury would not need to believe much of the [accused’s] testimony about what occurred in order to reasonably conclude that he had an honest but mistaken belief in consent’.

This judgment exemplifies the complex ways in which legal subjects are constituted as responsible, autonomous agents actively involved in governing their own conduct. This legal rationality rests on a legal construction of a type of woman that normalizes the behaviours and actions of intoxicated women. It is implied in this line of reasoning that a woman who becomes intoxicated should “expect something to happen” (Dawson, 1998: 193). Raising the defense of honest but mistaken belief in consent in this case both constructs the intoxicated woman as merely a sexualized body (Smart, 1995), and silences or marginalizes the woman’s perspective regarding her personal sexual autonomy and her understanding of consensual sex (Dawson, 1998:193). The woman is ascribed moral and legal responsibility for her sexual violation as she could offer no material evidence that supported her refusal or lack of consent to engage in the sexual activities. The rationale embedded within the majority’s reasoning implies that the woman, through her alcohol consumption, contributed to the circumstances that resulted in sexual assault, thereby making the man less responsible for his conduct. This responsibilization strategy presumes that if the woman really did experience an act as a personal violation, she would display appropriate resistance to that act and not behave in such a way that her resistance could be mistaken for consent (Gauthier, 1999).

Instead of focusing on the woman’s communication regarding her refusal to the sexual touching, Justice L’Heureux Dube (writing for the dissenting minority court) suggests that the judiciary should assess whether and how the accused ascertained the woman’s consent. This legal rationality urges a shift in the ways determinations of consent are constructed - away from the woman’s conduct and character towards the behaviour and actions of the man. The minority’s dissenting judgment represents an alternative strategy that responsibilizes men, rather than women, in sexual encounters. It

is advocated that the judiciary should shift the responsibility away from women and her actions, which are believed to have led the perpetrator to commit the assault, toward reponsibilizing men to ascertain consent through communication.

The dissenting minority judgment in *R. v. Esau* (1997), articulated by Justices L'Heureux-Dube and McLachlin, is adopted by the majority court in 1999 with the case of *R. v. Ewanchuk*. In this case, the Supreme Court overrides the Court of Appeal's decision to dismiss the appeal and makes a judgment that approves the appeal and orders a new trial. The legal rationalities of the majority's judgment reflect a concern with the woman's perspective of the sexual encounter, with the prevalence of sexual assault against women and children, with an interest in encouraging the reporting of sexual assaults, with dominant myths and stereotypes regarding women's sexuality and femininity, and with the notion of 'reasonable steps' that the man is expected to take in ascertaining the woman's consent. The legal rationalities of the majority court seem to indicate a greater sensibility to notions of fundamental justice (as outlined by s. 7 of the Charter) and to women's experiences of sexual assault. However, they nevertheless continue to perpetuate normative constructions of gender and sexuality. This is exemplified by Justice Major's remark, writing for the majority court, in which he asserts:

[A woman's] statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct.....[T]he question at this stage is purely one of credibility, and whether the totality of the complainant's conduct is consistent with her claim of non-consent (Justice Major in *R. v. Ewanchuk*, 1999).

It is within these lines of reasoning that any ambiguous conduct by the woman is indicative of a woman's incredibility, thereby making her statement of non-consent suspicious of fabrication or of vindictive intent. Furthermore, it is implied that the judges know what constitutes 'reasonable steps'. These legal rationalities arise from, but also

perpetuate, normative constructions of 'normal sex', 'normal expectations', 'normal gender-specific behaviours'. These constructions are then used as a standard of normalcy and commonality, in which the conduct of both the man and the woman are measured and judged against.

CHAPTER V

Conclusion

The legislative amendments of Bill C-49 emerged as a problem-solving initiative in response to the void created by the Supreme Court's decision in *R. v. Seaboyer*¹⁸. The legislative amendments provide the following: the legal parameters that judges use in determining the admissibility of a woman's past sexual history as evidence in sexual assault trials; a legal definition of the concept 'consent', including circumstances that negate consent; and restrictions on the mistaken belief in consent defense by requiring that an accused to 'reasonable' steps to ascertain a woman's consent. These three issues are woven so tightly together and interrelated with one another that they are best understood as dependant upon one another in judicial determinations of consent. The legal meaning of consent affects what an accused can be mistaken about, and this mistaken belief must be substantiated with relevant evidence and materials to validate an accused's claim of a woman's consent.

This research study has aimed to unpack the various ways that sexual assault cases are governed by the juridical field in light of the legislative amendments of Bill C-49. The judiciary's understandings of consent and the various modes of governance employed in establishing a woman's consent are central to understanding the power dimensions within which determinations of consent are produced. The governing

¹⁸ The majority of Supreme Court judges (seven of the nine) ruled in *R. v. Seaboyer* that restricting the use of evidence regarding a woman's prior sexual history with individuals other than the accused man was an unconstitutional violation of the man's right to a fair trial (McIntyre, 1994).

strategies employed by judicial actors entail complex assemblages of legal rationalities, expert knowledges and responsabilization strategies that arise from, and also perpetuate, normative constructions of gender and heterosexuality. Judicial determinations of consent, therefore, constitute a contested site where power is exercised through competing, and often opposing, common-sense discursive constructions of normality. Competing understandings of normality are exemplified by the diverse legal rationalities of judicial actors that construct 'normal heterosexual intercourse', 'normal appropriate conduct', 'normal gendered subjects', and juridical notions of 'legal relevancy' and 'fairness, in very different ways. These competing constructions of normality are justified and further contested through the legal consumption of various forms of expert knowledges.

Experts provide information, more specifically 'value-neutral' information, to judicial actors in determinations of consent. However, it is only through the transformation of expert knowledges to legal constructions of 'relevant evidence' that the truth of a woman's credibility, or (in)credibility, or a man's state of mind can be discovered. The legal constructions of 'relevancy', or of a woman's credibility, or even of the elements of a fair trial, are by far unanimous and undisputed issues within the juridical field. The production of knowledge in legal proceedings is a highly contested issue among judicial actors of the Supreme Court. The various ways that these governing mechanisms play out in sexual assault cases highlights the complexity involved in the production and dissemination of legal truth. It is through law's ability to make claims of truth regarding determinations of consent that power is deployed in ways that are expressly gendered. Recognizing the gendered nature of power, however, is not to

suggest that women are utterly incapable of exercising power and resistance within the legal realm. The involvement of feminist organizations and women's groups throughout the consultation processes of Bill C-49 exemplify the diverse types of power that women can deploy in legal reform initiatives.

Recognizing and commemorating the roles played by feminist organizations and women's groups in forming the substance of the new legislation is essential in providing an understanding of the power dynamics involved in the consultation processes of Bill C-49. The involvement of various women's groups throughout the consultation process illustrates the significant contributions made by various feminists, with varying perspectives and orientations, in constructing alternative discourses of sexual assault. For example, an alternative discourse of sexual assault is reflected in feminist attempts to broaden the legal understandings of sexual assault. This was achieved through feminist recommendations to enact legislation that was sensitive to women's diverse experiences (McIntyre, 1994). Women's groups, therefore, urged Parliament and others involved in the consultation process to consider broader social and political factors that affect women's consent and enact such considerations into the new legislation.

The feminist coalition's efforts to construct and draft legislative reforms regarding sexual assault offences involved powerful and aggressive strategies of resistance. During the consultation process, women's groups caucused and reached a consensus to publicly denounce Parliament's proposed legislative amendments and recommend its defeat if they did not entail the recommendations put forth by the coalition's members (McIntyre, 1994). These proposed recommendations included a codified definition of consent which included circumstances that do not constitute consent, the inclusion of a preamble, and

legislative reforms that reflected the presumption that sexual history evidence is irrelevant. The coalition soon reversed its plan of action, however, when the Minister announced that the proposed legislative reforms advocated by women's groups were amongst the considerations of Parliament's substantive amendments (McIntyre, 1994).

Although the legal reforms of Bill C-49 included many of the women's groups proposals, it is worth noting that many recommendations were also discarded and excluded from the final draft of Bill C-49 (see Appendix C for the coalition's full proposal). Most notably is the Bill's lack of recognition regarding the nexus between race and sex inequality. In other words, the Bill excluded any recognition of diverse vulnerabilities to sexual assault that are experienced by doubly disadvantaged women, such as aboriginal women, Black women and women of colour, elderly women, immigrant women, Jewish women, lesbians, poor women, refugee women, sex trade workers, women without full citizenship, women who have a disability, and children. Also of concern is the Bill's exclusion of the word 'unequivocal' in the statement "words or gestures which 'unequivocally' express or manifest voluntary agreement" in the Bill's definition of consent. Discarding the word 'unequivocal' raises some important questions regarding Parliament's commitment to legislative reform that is sensitive to broader social and political factors, outside of a woman's mental state, attitude or disposition, which affect a woman's 'genuine' consent (Baker, 1999).

The coalition's approach to the legislative reforms of Bill C-49 arose from and were validated by the Charter of Rights and Freedoms (established in 1982), specifically the equality guarantees (McIntyre, 1994). By focusing on the inequalities between men and women in cases of sexual assault, women's groups assembled together and required

immediate demands from Parliament. They required substantive and procedural amendments to sexual assault legislation that was aimed at resolving the gender-specific injustices embedded within judicial determinations of consent; injustices that routinely prioritized men's rights to a fair trial over women's rights to equality. Whereas the introduction of the Charter can be seen as a powerful and progressive tool for sexual assault legal reforms, it can also be seen as a tool that has narrowed and polarized the way sexual assault is understood in society. Emphasizing the competing rights of the man and the woman (Fudge, 1989) perpetuates an understanding of rights discourse that is not only organized and prioritized according to a 'hierarchy of rights' (where the right to a fair trial is higher on the scale because of its history within legal liberalism) but organizes individual rights in oppositional modes according to constructions of essential gender differences between men and women.

Employing a feminist understanding of governance in this research study alerts us to the various ways that law's operations and legal rationalities participate in the construction of gendered identities and normative heterosexuality within determinations of consent. This research study has contributed to an understanding of the diverse politics of consent through an analysis that describes the complex ways that judicial determinations of consent contribute to common-sense perceptions of difference between masculinity and femininity. It is these common-sense perceptions of difference which "sustains the social and sexual practices which feminism is attempting to challenge" (Smart, 1995:79). Exploring the taken-for-granted assumptions of gender and sexuality embedded within various legal rationalities illustrates the potential for other forms of resistance which aims to provide a discourse of sexual assault that takes into account the

diversity and heterogeneity of experience. This is already evident in feminist refusals to understand sexual assault as violence. Understanding sexual assault as violence presumes that there will be some visible injury or harm to the body, thereby erasing other factors, such as fear, that may cause a woman to passively submit to sexual coercion (McKinnon, 1987; Smart, 1995). In addition, many feminists and judicial actors have abandoned the term 'victim' as a descriptor for women who have experienced sexual assault, although for very different reasons. Whereas many feminists argue that the victim-oriented conceptualization of sexual assault diminishes the power and agency that women can deploy in overcoming sexual coercion, judicial actors, on the other hand, claim that by making reference to a woman as a 'victim' the court infringes the right of an accused person to be presumed innocent until proven guilty (See R. v. Seaboyer, 1991). Therefore, in keeping in line with the presumption of innocence of the accused, judicial actors apply the term 'complainant' to women who are making a claim of sexual assault. However, the uncritical use of the term 'complainant' by judicial actors denotes something that is minor, trivial, insignificant, a nuisance (Major, 1994:275). It trivializes and undervalues women's experiences of sexual assault by aligning the coercive experience with a mere complaint.

More research and innovative scholarship needs to be done that addresses judicial constructions of various types of 'women' who have survived incidences of sexual assault, such as constructions of an intoxicated woman, or of black womanhood or Aboriginal womanhood. Disrupting these judicial constructions of types of women, provides a space for the shifting and reconstructing of gender identities and understandings of heterosexuality. Equally important, however, is a need to further

examine the legal rationalities and operations of law within judicial determinations of consent at lower trial court levels as this is where the bulk of sexual assault cases are tried and determined.

This research study is a specific case study of Bill C-49, specifically the various ways that the Bill has been interpreted and executed by judicial actors of the Supreme Court in determinations of consent. It is only by looking at legal rationalities and operations of law, in a specific historical context, that enables us to see the diverse and conflicting modes of legal governance surrounding issues of consent today. Drawing on the work of Amy Chasteen (2001) suggests that women define rape and understand rape in a myriad of ways. The varying social positions and life experiences of women shapes their understandings of sexual assault in non-uniform and in often contradictory ways (Chasteen, 2001). Therefore, there is a need to further explore how women resist and negotiate constructions of gender and sexuality within the context of sexual assault as this may provide us with alternative discourses of sexual assault which seek to destabilize categories of gender and sexuality. Not only is the law a significantly powerful discourse because of its power to develop its own method, system of results, and specialized languages (Smart, 1995), it also can silence and marginalize other discourses throughout the processes of establishing laws of truth. Interrogating the legal rationalities of judges and the operations of law that they employ is critical if we are to unmask the normative constructions of gender identity and heterosexuality embedded within judicial determinations of consent. It is only through such interrogations that we can move towards a reconceptualization of sexual assault that is founded on a 'positional and situated ethics' (Smart, 1995) – an ethics that merges a recognition of diverse subject

positions and lived experiences with a moral responsibility not to harm others – rather than understanding sexual assault in terms of essential differences between men and women or masculinity and femininity.

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Appendix A

Preamble to Legislative Amendments of Bill C-49

WHEREAS the Parliament of Canada is gravely concerned about the incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual assault against women and children;

WHEREAS the Parliament of Canada recognizes the unique character of the offence of sexual assault and how sexual assault and, more particularly, the fear of sexual assault affects the lives of the people of Canada;

WHEREAS the Parliament of Canada intends to promote and help to ensure the full protection of the rights guaranteed under sections 7 [fundamental justice] and 15 [equality] of the Canadian Charter of Rights and Freedoms;

WHEREAS the Parliament of Canada wishes to encourage the reporting of incidents of sexual violence or abuse, and to provide for the prosecution of offences within a framework of laws that are consistent with the principles of fundamental justice and that are fair to complainants as well as to accused persons;

WHEREAS the Supreme Court of Canada has declared the existing section 276 of the Criminal Code to be of no force or effect;

AND WHEREAS the Parliament of Canada believes that at trials of sexual offences, evidence of the complainant's sexual history is rarely relevant and that its admission should be subject to particular scrutiny, bearing in mind the inherently prejudicial character of such evidence;

NOW THEREFORE, Her majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows

Appendix B

Legislative Amendments of Bill C-49:

An Act to Amend the Criminal Code (sexual assault)

AS PASSED BY THE HOUSE OF COMMONS

JUNE 15, 1992

An Act to amend the Criminal Code (sexual assault)

1. The Criminal Code is amended by adding thereto, immediately after section 273 thereof, the following sections:

273.1 (1) Subject to subsection (2) and subsection 265(3), ‘consent’ means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

(2) No consent is obtained, for the purposes of sections 271, 272, and 273, where

- f) the agreement is expressed by the words or conduct of a person other than the complainant;**
- g) the complainant is incapable of consenting to the activity;**
- h) the accused induces the complainant to engage in the activity by abusing a position of trust, power, or authority;**
- i) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity;**

or

- j) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity**

(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

273.2 It is not a defense to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

- a) the accused's belief from the accused's
 - (i) self-induced intoxication, or**
 - (ii) recklessness or wilful blindness; or****
- b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.**

2. Section 276 of the said Act is repealed and the following substituted therefore:

276. (1) In proceedings in respect of an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused

or with any other person, is not admissible to support an inference that, by reasons of the sexual nature of that activity, the complainant

- (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or**
- (b) is less worth of belief.**

(2) In proceeding in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence

- a) is of specific instances of sexual activity;**
- b) is relevant to an issue at trial; and**
- c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.**

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account.

- a) the interest of justice, including the right of the accused to make a full answer and defense;**

- b) society's interest in encouraging the reporting of sexual assault offenses;**
- c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;**
- d) the need to remove from the fact-finding process any discriminatory belief or bias;**
- e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;**
- f) the potential prejudice to the complainant's personal dignity and right to privacy;**
- g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and**
- h) any other factor that the judge, provincial court judge considers relevant.**

Appendix C

Proposals of January Coalition for Preamble

1. Print the preamble in the Criminal Code
2. Add a clause before the sexual assault provision as follows:

The sexual assault provisions of the Criminal Code and, in particular, ss. 265-278 inclusive, shall be interpreted and applied in accordance with this Preamble.
3. Resequence and amend text as follows (passages in bold indicate recommended revisions; existing paragraph in the draft of Bill C-49 tabled 12 December 1991 indicated in parentheses).

Whereas the Parliament of Canada intends to promote **and ensure** the full protection of the rights guaranteed under sections 7 and 15 of the Canadian Charter of Rights and Freedoms; (C-49's para 5)

Whereas the Parliament of Canada is gravely concerned about the incidence of sexual violence and abuse in Canadian society **and, in particular, the prevalence of sexual assault against women and children;** (c-49's para 2 with new addition)

Whereas the Parliament of Canada recognizes the unique **historical role** of the laws of sexual assault, **of actual assault** and of fear of assault **in denying and restricting the constitutional rights of women;** (C-49's para 3 with additions and revisions)

Whereas the Parliament of Canada recognizes that vulnerability to sexual assault and diminished access to justice are directly related to social inequalities such as those experienced by aboriginal women, **Black women and women of colour, elderly women, immigrant women, Jewish women,**

lesbians, poor women, refugee women, sex trade workers, women without full citizenship, women who have a disability, and children; (new clause)

Whereas Parliament recognizes that the continued operation of sexist myths about sexual assault and women's sexuality is inconsistent with the promotion of rights and freedoms enshrined in the Charter; (new)

And whereas the Parliament of Canada believes that at trials of sexual offences, evidence of the complainant's sexual history is rarely relevant and that its admission should be subject to particular scrutiny; bearing in mind the inherently prejudicial effect of such evidence

VITA AUCTORIS

Marcia Oliver was born in 1977 in Woodstock, Ontario. She graduated from Huron Park Secondary School in 1996. From there she went on to the University of Windsor Ontario where she obtained a combined Honours B.A. in Sociology and Criminology in 2000. She is currently a candidate for Master's degree in Sociology at the University of Windsor and hopes to graduate in Fall 2002. Her next academic endeavour involves attending the Ph.D. programme in Sociology at York University.